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The Hague Convention on Child Abduction:—A Canadian Primer

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1. THE NEED FOR A HAGUE CONVENTION PRIMER

The *Hague Convention on the Civil Aspects of International Child Abduction* is an international treaty that Canada has signed, but it is also part of the law of Canada as a result of its incorporation into provincial and territorial statutes. The *Convention* is intended to address problems that arise when children are wrongfully taken by one parent from one country to another in the context of parental separation, and to deter wrongful international removals of children. The *Convention* establishes a common legal framework for signatory nations, despite differing cultural and legal traditions, to return children wrongfully removed or retained in one jurisdiction in breach of parental "rights of custody" to the place where the children habitually reside. The main purpose of the *Convention* is to ensure that custody litigation takes place in the jurisdiction in which the children habitually reside

Applications under the *Hague Convention* are becoming more common in Canada, reflecting increased international mobility and immigration to this country.[1] Using the *Hague Convention* poses unique practical and conceptual challenges for family practitioners. These applications require urgent resolution, and often communication between counsel, courts and agencies in different countries. There may be different expectations for the role of lawyers and courts, as well as different conceptual frameworks for understanding family law, and not infrequently language and communication issues as well. Further, despite the increasing number of such applications, most family counsel in Canada and many judges have little or no familiarity with the issues that must be faced in these cases, since they occur relatively rarely in any individual practice or judicial caseload.[2] Beyond the practical problems are significant conceptual challenges, as the *Convention* uses some terminology that is unfamiliar, and also uses familiar terminology in unfamiliar ways.

Further, the context for the application of the *Convention* has changed. When the *Convention* first came into force in 1980, a major concern of the drafters was wrongful abduction of children by fathers without custody rights. In recent years, however, the *Convention* has most often been invoked when, after separation, mothers with primary care but shared custody rights take their children back to the jurisdiction where their own parents or relatives reside, or seek to flee abusive partners.[3]

This article is intended to serve as a primer for Canadian judges and lawyers on the basic concepts and provisions of the *Convention*.[4] The main focus is on *Convention* proceedings in Canada, that is when the child is in Canada and the left-behind parent is seeking return of the child, though there is some discussion of steps that Canadian courts and lawyers can take when a child is wrongfully removed from this country and there must be enforcement in the jurisdiction to which the child is taken.[5] For illustrative purposes, we tend to quote the applicable legislation in Ontario, but the legislation is essentially identical in all Canadian provinces and territories, and we quote jurisprudence from across the country.

The article begins by discussing the origin and purposes of the *Convention*, and the nature of the proceedings. We then consider the key concepts in *Convention* proceedings. Next we address the "defences" or exceptions to the principle of return. We discuss how courts are dealing with concerns relating to the return of children, especially in cases where there are

allegations of violence or abuse, including the use of undertakings, conditions, and mirror orders to facilitate safe return. We include consideration of judicial communication between courts in different jurisdictions to improve communication and co-ordination in *Hague* cases. We then address issues that are emerging relating to the role and rights of children to participate in *Hague* proceedings. In the last part of the article, we consider procedural issues that arise in *Hague* proceedings, and we conclude by briefly discussing measures that can be undertaken to improve the implementation of the *Convention.*

2. THE PURPOSE AND NATURE OF HAGUE PROCEEDINGS

(a) The Origin of the Hague Convention

The *Hague Convention on the Civil Aspects of International Child Abduction* is one of a number of international treaties that have been negotiated under the auspices of the Hague Conference on Private International Law, an international body with over 75 member nations from around the world. Based in The Hague, Netherlands, the Conference has existed since 1893. Its purpose is to negotiate treaties that member nations may adopt to govern cross-jurisdictional issues in various areas of private law, mainly in commercial and economic matters, but also family law. The Conference has been responsible for the negotiation of many treaties that deal with jurisdiction, recognition of foreign orders and enforcement issues. One of the most utilized Conventions is the *Convention on the Civil Aspects of International Child Abduction,* or, for family practitioners, simply the *"Hague Convention."*[6] While there are many different "Hague Conventions," including one on International Adoptions and another on Child Protection, for the purposes of this article, the "*Hague Convention*" or the *"Convention,"* is the *Convention on the Civil Aspects of International Child Abduction.*

The *Hague Convention on Child Abduction* was adopted by the Conference on International Law in October 1980. Canada was one of the first nations to sign the treaty, on October 25, 1980. All of the Canadian provinces and territories enacted legislation to adopt the *Convention.*[7] For example, the *Convention* appears as a schedule to s. 46 of Ontario's *Children's Law Reform Act.*

The purpose of the *Convention* is set out in its Preamble, where the signatory states affirm that "the interests of children are of paramount importance in matters relating to their custody", and that they adopted the *Convention* with the intent of

> protect[ing] 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. . . .

The *Convention* provides for the adoption of uniform legal rules regarding the international removal of children whose parents are separated or divorced, and for the establishment of government agencies to assist with international enforcement issues ("Central Authorities"). A primary objective is to deter parents from removing children from their place of habitual residence and seeking a legal resolution elsewhere. The *Hague Convention* requires the courts of signatory nations to order the return of wrongfully removed children to their place of habitual residence for resolution of any custody disputes, with some relatively narrow exceptions.

In interpreting the *Convention,* courts in signatory nations generally try to respect the *Convention* jurisprudence of other signatory nations, so that there is some degree of consistency in the application of the *Convention.* There are inevitably, however, some inconsistencies in its implementation and interpretation in different countries. The Permanent Bureau of Hague Convention has a useful website, INCADAT, which includes a data base of leading *Convention* jurisprudence from signatory nations.[8]

(b) Invoking the Convention: Contracting States

In order for the *Convention* to be applicable, both countries (the one to which the child has been removed, and the one from which the child was removed) must have adopted the *Convention;* these are called "contracting states".

Over 50 countries have adopted the *Convention,* mainly in Europe, Australasia and the Americas, and a few in Asia and Africa.[9] The Permanent Bureau has helpful profiles for each country on its website, providing contact information for the Central Authority for each state (more about Central Authorities below). The country profiles include information about the process and the extent of the assistance the Central Authority will provide in each contracting state.[10]

If one of the countries involved is not a signatory to the *Convention*, the cases can be more challenging, and will require consideration of the conflict of law issues, as well as consideration of the local laws regarding jurisdiction in custody and access cases.[11]

(c) What does the Hague Convention Protect?

Subject to limited exceptions, the *Convention* provides for prompt return of wrongfully removed or retained children to their country of habitual residence, protecting the jurisdiction of the courts of the states in which children are habitually resident to make determinations about custody and access. The *Convention* generally requires resolution of "best interests" disputes concerning custody to take place in the jurisdiction of the child's habitual residence, which will normally be the jurisdiction where evidence is most readily available.[12]

The *Convention* discourages unilateral removal of children by one parent in the hope of gaining tactical advantage in custody proceedings. The *Convention* protects "rights of custody" in cases in which children have been "wrongfully removed" or "wrongfully retained" across international boundaries between contracting states. While there is no real protection afforded to rights of access under the *Convention*, the concept of "rights of custody" is broadly defined, and in many cases non-residential parents will have "custody rights" and may be able to invoke the *Convention*. The *Convention* does not deal with abductions or wrongful removals *within* a federal state like Canada.[13]

The *Convention* addresses "wrongful removal or retention" of a child:

> **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* . . . 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. [Emphasis added]

Article 16 of the *Convention* specifically directs courts outside the child's jurisdiction of habitual residence to *not* undertake consideration of the merits of custody requests, unless it has been determined that a child is not going to be returned pursuant to the *Convention*:

> **Article 16**
>
> 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. . . .

The Convention is intended to ensure that, with some specified exceptions, a child who has been wrongfully removed or retained is to be returned to the jurisdiction of his or her habitual residence, and the issue of a child's custody is to be resolved in the jurisdiction in which the child is habitually resident.[14] The child's habitual residence may be different from his or her citizenship or domicile. Only courts in the child's "habitual residence" are to engage in an investigation of a child's "best interests."

The main issues to be addressed in a *Convention* application are:

1. Is the child 16 years of age or younger? (Article 4)

2. If so, was the child "habitually resident" in the left-behind jurisdiction? (Article 3(a))

3. If so, did the left-behind parent have "rights of custody"? (Article 3(a))

4. If so, was the left-behind parent exercising custody rights at the time the child was removed or retained? (Article

3(b)).

5. If the answers to questions 1 to 4 are "yes", are there any exceptions in the individual case recognized in the *Convention* to the general expectation that the child will be returned to his or her place of habitual residence? (Articles 12 and 13).[15]

The notion that a child's best interests are not at stake in a *Convention* hearing about wrongful removal or retention is often challenging for family lawyers and judges, as well as for many parents. This is because the concept of the "best interests of the child" is generally considered central to the family justice process. However, in a *Convention* application, the central premise is that in most cases only the court in a child's habitual place of residence has the jurisdiction to make determinations about the child's best interests. Other courts are to respect that, unless the facts fall into one of the exceptions set out in Article 13. The *Convention* is intended, therefore, to serve the "best interests" of children, in general, by deterring the abduction of children across international borders.

Access rights are not enforced under the *Convention*. While Article 21 encourages each contracting State's Central Authority to "promote the peaceful enjoyment of access rights," the article does not provide any remedies for breach of access rights. As a result, our focus is on applications dealing with breaches of "rights of custody." However, as will be discussed, the concept of "rights of custody" is broadly defined and, in some circumstances, may be enforced by a parent who is not the primary residential parent. Further, at least on an interim basis, courts may address access issues in the context of a *Hague* application.

(d) Who Can Invoke the Convention

Usually the applicant in a *Convention* application is the left-behind parent, though any person, or even any "institution or any other body" with rights of custody, such as a child welfare agency, may apply for the return of a child pursuant to Article 3. As discussed below, the Central Authority may have a role in these proceedings, but in all Canadian provinces except New Brunswick, it is ordinarily the applicant parent who must retain counsel (or appear in person).

3. BASIC CONCEPTS IN HAGUE CONVENTION PROCEEDINGS

The *Convention* and its international case law define certain key concepts, such as "custody rights" more expansively than the domestic legislation of Canada. There are other important terms that are entirely specific to the *Convention*, and do not have domestic counterparts.

(a) Requesting and Requested States

The *Convention* is intended for use in legal proceedings in the jurisdiction to which a child has been taken. For example, if a child has been taken from Canada to the Czech Republic, the parent left-behind in Canada would commence a *Hague* application in the Czech Republic, either directly or with the assistance of the Central Authority in the province of his or her residence, and would request the return of the child to Canada. Canadian counsel might be involved in assisting the parent, including help in locating the child, and retaining and supporting Czech counsel, but the actual proceeding would be conducted by the Czech counsel in that country. When a child is wrongfully removed from Canada, the left-behind parent is generally discouraged by Canadian case law from then commencing a custody application in Canada.[16] However, if a child is wrongfully removed from Canada while proceedings are under way in this country, Canadian courts may continue to have a role.

The *Convention* provides that the court in the jurisdiction to which a child has been removed is "requested" to return the child, and that state is usually referred to as the "requested" state. The habitual residence of the child is usually referred to as the "requesting" state.

As discussed in more detail below, any person, institution or body claiming a breach of a right of custody may apply; but it is also possible, in some jurisdictions, that the Central Authority will be the applicant.[17]

(b) The Role of the Central Authority

Each signatory state is obliged to have a "Central Authority" to assist with *Convention* requests from parents and to liaise

with Central Authorities of other signatory states (Article 6). Federal states, such as Canada, Australia and the United States generally also have a Central Authority in each province, state or territory.

The Central Authorities have stated purposes, set out in Articles 6 and 7:

> **Article 6**
>
> A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities. Federal States, States . . . shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.
>
> **Article 7**
>
> Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention. In particular, either directly or through any intermediary, they shall take all appropriate measures:
>
> (a) to discover the whereabouts of a child who has been wrongfully removed or retained . . .
>
> (c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
>
> (d) to exchange, where desirable, information relating to the social background of the child . . .
>
> (h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;.

In addition, Article 10 requires the Central Authority in the requested state to "take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child."

Contracting states have a high degree of flexibility in determining how much of the legal work the Central Authority will undertake in a *Convention* application, and there is great variation in the roles that they play, especially in court. The country profiles on the INCADAT website indicate the type of role that Central Authorities in each state undertake. For example, some European Central Authorities, such as in Germany, will take the matter to court on behalf of the left-behind parent in the requested state. Others will not, and the left-behind parent will have to arrange for legal representation independently.

In Canada and the USA, the Central Authorities play an active and often very important role in liaising with police and border control authorities and other agencies to help locate children removed from or to the jurisdiction. If a child is believed to have been taken to Canada, the left-behind parent may contact the Central Authority in the child's habitual residence, which will contact Canada's Central Authority, which will forward any request from a person outside Canada for the return of a child thought to be in Canada to the Central Authority for the particular province involved. The provincial Central Authority will work with the police and left-behind parent to try to locate a child, and will offer assistance in finding a lawyer, and on how to commence an application in court. However, in Canada and the USA, the Central Authority is not generally the applicant in court proceedings, and does not usually provide legal representation for a person requesting the return of a child;[18] New Brunswick is an exception, and the provincial Ministry of the Attorney General may undertake proceedings on behalf of a left-behind parent in another jurisdiction.

Under Article 25 of the *Convention*, the applicant and respondent are both eligible for legal aid for *Hague* proceedings to the same extent as those resident in the province; however, in Canada, eligibility for legal aid is limited to those with very low incomes.

Some provinces have protocols that are to be followed by the Central Authority of a requesting state or a parent requesting the return of the child. While the protocols vary from province to province, in most provinces, including Ontario, the Central Authority (the Ministry of the Attorney General) will provide significant assistance to left-behind parents to locate a child. However, left-behind parents need to retain their own counsel if a court application is commenced.

(c) "Rights of Custody"

The *Hague Convention* requires return of children to their jurisdiction of "habitual residence" if the left-behind parent had "rights of custody" at the time of removal or retention. Canadian statutes generally do not define "custody", and what rights and responsibilities it entails. The *Divorce Act* is silent about what "custody" means.[19] Canadian case law defines custody, *for domestic law purposes*, for example as set out in the 1979 Ontario Court of Appeal decision in *Kruger v. Kruger*:

> to award one parent the exclusive custody of a child is to clothe that parent, for whatever period he or she is awarded the custody, with full parental control over, and ultimate parental responsibility for, the care, upbringing and education of the child, generally to the exclusion of the right of the other parent to interfere in the decisions that are made in exercising that control or in carrying out that responsibility.[20]

Rights of custody are defined more broadly in the *Convention* than the Canadian domestic concept of custody, with Article 5(a) providing:

> "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.

In the leading Canadian case of *Thomson v. Thomson*[21] the Supreme Court of Canada established that the concept of "custody" for the purposes of the *Convention* is more comprehensive than the domestic understanding of "custody," and can include custody that arises "by operation of law:"

> Custody, as understood by the Convention, is a broad term that covers the many situations where a person lawfully has the care and control of a child. The breach of rights of custody described in Article 3 . . . are those attributed to a person, an institution or any other body by the law of the state where the child was habitually resident immediately before the removal or retention. Article 3 goes on to say that custody may arise by operation of law. The most obvious case is the situation of parents exercising the ordinary care and control over their child. It does not require any formal order or other legal document, although custody may also arise by reason of a judicial or administrative decision, or by agreement.[22]

A left-behind parent can have "rights of custody" under the *Convention* even if there is no order or agreement regarding custody, and even if the requesting parent has given up day to day care of the child to the parent who has removed the child from the jurisdiction, as illustrated by *Kirby v. Thuns*.[23] The parties and children resided in Romania at the time of separation. In a court application which the father commenced in Romania prior to the mother moving the children to Canada, the father conceded the children's daily care to the mother, but he made a claim for continued involvement in their "upbringing, care, education, studies and professional training"[24] The mother took the children to Ontario, and the father brought an application for their return pursuant to the *Convention*. Similar to the law in Ontario, pursuant to Romanian law, both parents had "equal rights and duties" towards the children until such time as a court ordered otherwise. In Ontario, Justice Linhares de Sousa held that this was enough to establish that the father had "rights of custody" within the meaning of the *Convention*.

If parents separate in one jurisdiction and there is no order or agreement, removal of the children by the primary care parent (usually the mother) will often give the left-behind parent ground for a *Convention* application. However, if there is an order or agreement in the jurisdiction of habitual residence giving one parent custody and the other parent access, the *Convention* does not protect rights of access. There is no provision for returning a child to his or her habitual residence if there has been a breach of access rights because of removal from the jurisdiction, and no provision in the *Convention* to enforce access rights in the jurisdiction to which a child is removed.

"Rights of custody" under the *Convention* for a left-behind parent may sometimes be forfeited even without a court order or agreement. If the parent with a custody order or rights removes a child, the issue will be whether the left-behind parent also had "rights of custody." In *Espiritu v. Bielza*[25] the mother had been granted custody by court order in Texas. Before the divorce proceedings could be finalized there, the mother committed suicide, and the child lived with the maternal aunt. The aunt obtained a final custody order in the Texas divorce proceeding, as an intervener. The final custody order had a provision in it requiring the aunt to notify the father of any change in residence. The aunt then moved to Ontario with the child and did not notify the father. The father brought an application in Ontario pursuant to the *Convention*. Justice Spence held that the failure to provide notice of the move did not amount to breach of a custody right, and that therefore the *Convention* did not apply.

(d) "Chasing Orders"

Orders for custody made in the jurisdiction of the left-behind parent *after* the child has been wrongfully removed from the jurisdiction are referred to as "chasing orders." These custody orders are often made without notice to the removing parent, or at least without the attendance of that parent; the left-behind parent who obtains the chasing order then attempts to enforce in the jurisdiction to which the child has been taken.[26] However, Article 17 of the *Convention* provides that the "sole fact" that there is a custody order, or that a parent is entitled to seek a custody order in the place of habitual residence, is not by itself grounds for returning a child to the place of habitual residence.

Obtaining a chasing order may seem like an understandable response by the left-behind parent. However, if the child is removed *to* Canada, a chasing order may actually exacerbate the very enforcement issues that the *Convention* is intended to address, as it may create problems for the Canadian court.

The purpose of the *Convention* is to re-establish the *status quo* or level the playing field, so that the issue of custody can be determined in the child's place of habitual residence, by a court hearing all of the evidence in a fair manner. If the left-behind parent has obtained a chasing order granting custody, the *status quo* will have been changed. The left-behind parent will have a custody order, and the parent who removed the child will not. This may be seen by the Canadian courts as creating an unfair advantage to the left-behind parent.

In *Thomson v. Thomson*[27] the Supreme Court of Canada suggested that obtaining a chasing order may actually be counterproductive (at least if the child is brought to Canada), as that order may interfere with the main purpose of the *Convention*, which is to return the child to the habitual residence, so that the *status quo* can be re-established, and the issue of custody can then be addressed by the court in the child's jurisdiction of habitual residence. If a chasing order is made, the *status quo* cannot easily be re-established because there will be a new "legal regime." However, if a chasing order has been made in the child's place of habitual residence, a Canadian judge making a *Convention* order may return the child, conditional on the left-behind parent giving undertakings not to enforce the chasing order,[28] a matter further discussed below.

Chasing orders do not in themselves create "rights of custody" within the meaning of the *Convention*. The Supreme Court of Canada held in 1996 in *W. (V.) c. S. (D.)*[29] that a custody order obtained *following* the removal of a child, without the benefit of a full hearing on the issue of custody, does not give the left-behind parent "rights of custody" that can be enforced under the *Convention*, though the left-behind parent may have other rights under the *Convention*.

The Canadian approach in *Thomson* is not followed in all jurisdictions, and there are some jurisdictions to which a child is taken outside of Canada for which it may be useful to obtain a Canadian chasing order, especially if proceedings were commenced in Canada before removal of the child.[30] Canadian counsel should liaise with foreign counsel or the Central Authority about the question of whether it will be useful to obtain a Canadian chasing order for use in proceedings in a foreign requested state.

(e) Ne Exeat or Non-Removal, Clauses

Article 5(a) of the *Convention* provides that "rights of custody" shall include "in particular, the right to determine the child's place of residence." There is an important debate in the *Convention* jurisprudence as to whether a right to determine a child's place of residence creates a "right of custody" for purposes of the *Convention*.

A common clause in separation agreements and court orders provides that the child's residence may not be changed without the written consent of both parties or a court order. The clause is often phrased as a restriction on the custodial parent's authority. In *Convention* jurisprudence, such clauses are referred to as are "*ne exeat*" clauses. The term "*ne exeat*" has long been used in a range of legal contexts to mean that a party to litigation is not allowed to leave the jurisdiction.[31] In the context of the *Convention*, however, it means that a parent is not allowed to leave the jurisdiction with a child. In some jurisdictions, but not Canada, *ne exeat* clauses create a "custody right" within the meaning of the *Convention*.

In 1994 in *Thomson v. Thomson*[32] the Supreme Court of Canada held that a provision in an *interim* order preventing the removal of a child creates a "right of custody", because the purpose of the interim order is to preserve the jurisdiction of the court making the interim order to continue to make decisions regarding the child's custody. Such a provision in a *final* order, however, did not, in the view of the Court, automatically create a right of custody pursuant to the *Convention*, with La Forest J. writing:

> 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.[33]

Thomson suggests that in cases in which one parent has custody, and the other access, non-removal clauses in final orders serve only to protect the right of access of a non-custodial parent, and do not give the access parent the right to determine a child's place of residence, as set out in Article 5 of the *Convention*; therefore the Supreme Court, in *obiter dicta*, suggested that non-removal clauses in final orders do not create "rights of custody." The Court's distinction between interim and final *ne exeat* orders as set out in *Thomson* has generally been followed in Canada,[34] though not in other countries.

Some scholars have been critical of the approach of the Supreme Court in *Thomson* concerning *ne exeat* clauses. Prof. Martha Bailey argues that the *obiter* of *Thomson* should be reconsidered.[35] She notes that courts in a number of jurisdictions have concluded that non-removal clauses in orders and agreements create rights of custody, including in the UK and the USA. The creation of a "right of custody" in this fashion is not always straightforward. In *D (a child), Re*[36], the House of Lords held that a father's right, set out in the original order or agreement, to restrict travel by the mother and children amounted to a "custody right" within the meaning of the *Convention*; however, the right to make an application to court to seek an order preventing removal of the child was not a "custody right" within the meaning of the *Convention*.[37]

In 2010 in *Abbott v. Abbott*,[38] the US Supreme Court held that provisions in a court order preventing the removal of a child created a "right of custody" pursuant to the *Convention*. The Court noted that a *ne exeat* right does not create the same type of custody right as is commonly recognized in American (or Canadian) law, but held that this was "beside the point:"

> That a *ne exeat* right does not fit within traditional notions of physical custody is beside the point. The Convention defines "rights of custody," and it is that definition that a court must consult. This uniform, text-based approach ensures international consistency in interpreting the Convention. It forecloses courts from relying on definitions of custody confined by local law usage, definitions that may undermine recognition of custodial arrangements in other countries or in different legal traditions, including the civil-law tradition.[39]

In light of subsequent decisions in the United States, the United Kingdom and other countries (including Australia, Germany, Israel and New Zealand), Prof. Bailey argues that Canadian courts should be re-thinking the position set out in *obiter* in *Thomson*. The *Thomson* position rested on the premise that the main reason for an interim non-removal clause is to preserve the court's jurisdiction to determine custody on a final basis, while the main reason for a non-removal clause in a final order is to preserve the non-custodial parent's right of contact only, and accordingly it does not create a right of custody. From the perspective of parents, this reasoning almost certainly does not reflect the usual purposes for inclusion of non-removal clauses in interim or final orders and agreements. Most parents want these clauses to ensure that they can continue to have regular and significant contact with their children; they are usually not thinking about whether the court in a particular jurisdiction maintains a right to determine the custody outcome, and they would understandably see little functional difference between a non-removal clause in an interim order, or in a final order. For most parents, and no doubt for many lawyers and judges, the right to determine a child's place of residence is an essential component of legal custody, whether under domestic law or under the *Convention*.

(f) "Habitual Residence"

The application of the *Convention* is not based on citizenship. A child can be a citizen of a country that is neither the requesting or requested state, and similarly, the parents may not be citizens of either the requesting or requested states. It is the child's habitual residence prior to the removal or wrongful retention that determines whether the *Convention* will apply.

Article 3 makes it clear that before a decision can be made about the return of a child, the court must determine whether the child was habitually resident in the requesting state. The term "habitual residence" is not defined in the *Convention*, but has been the subject of litigation in many contracting states, and is widely used in domestic family statutes for purposes of determining court jurisdiction.

One of the leading Canadian cases on the issue of habitual residence in *Convention* cases is the 2004 Ontario Court of Appeal judgment in *Korutowska-Wooff v. Wooff*.[40] The father was a Canadian diplomat stationed in Poland who had married a Polish

citizen prior to the posting. The children were born in Canada and were Canadian citizens, but had resided in Poland with the parents for seven years. When he was transferred back to Canada, the father decided to end his marriage and took the two children to Canada with him. The mother, who was having an affair with a man in Poland, commenced an application in Ontario for the return of the children to Poland pursuant to the *Convention*. The father argued that because he was always subject to returning to Canada, he was not "habitually resident" in Poland, and since he was the primary caregiver for the children, the children were therefore not habitually resident in Poland. The judge at first instance held that the children were habitually resident in Poland, and ordered their return, a decision affirmed by the Ontario Court of Appeal, which held that

1. The parties need not intend to be resident in the "habitual residence" on a permanent basis;

2. In applying Article 3, the court must assess habitual residence of the children as of the date of removal, and not as of any time thereafter;

3. In determining habitual residence, the following principles apply:

    a. The question of habitual residence is a question of fact to be decided based on all of the circumstances;

    b. The habitual residence is the place where the person resides for an appreciable period of time with a "settled intention";

    c. A "settled intention" or "purpose" is an intent to stay in a place whether temporarily or permanently for a particular purpose, such as employment or family;

    d. A child's habitual residence is tied to that of the child's custodians.

Although rare, it is also possible for a child to have no "habitual residence." In *Jackson v. Graczyk*[41] the parents had never lived together, and the mother had been the child's custodial parent since birth. The mother was a Canadian citizen who had lived in Florida for several years but without legal status and was there when the child was born; a few months later she was deported, at which point the mother moved to Ontario to live with her family. The father was present at the child's birth, and saw the child from time to time in Florida, but he was not involved in the child's life in a way that demonstrated the "stance and attitude" of a parent. After the mother moved to Ontario, the father obtained a custody order in Texas where he resided, and also commenced a *Convention* application in Ontario. The Ontario judge at first instance, Czutrin, J., found that the child's habitual residence was tied to that of his mother, and the mother was not habitually resident in Florida, because of her uncertain employment and immigration status in that jurisdiction. The child had never lived in Texas, and was clearly not habitually resident there, even though it was the father's habitual residence. The court held that for the purposes of the *Convention*, the child had no habitual residence as of the date he was removed from Florida, and the father's *Hague* application was dismissed, a decision affirmed by the Court of Appeal. The evidence did not establish that the child resided in the United States for an appreciable period, and the mother had no settled intention to stay in Florida. The application judge's conclusion that Ontario had become the child's habitual residence made "practical sense" and was consistent with the mother's settled intention. Further, ordering the child to return to Florida would have produced a result that was both unjust and at odds with the aim of the *Convention*.

In some cases a child may have two alternating habitual residences, which may result in outcomes in *Convention* cases that are inconsistent with the agreement of the parents. In *Wilson v. Huntley*[42], Mackinnon J. held that the four-year-old child had alternating habitual residences in two different jurisdictions. The parents had lived together in Alberta. A few years following separation, the mother wanted to move with her new partner to Germany. The parties agreed to continue to have joint custody, with alternating 3 months periods of care, providing in their agreement that Alberta would be the jurisdiction in which any custody disputes would be resolved. The father then moved to Ontario, and the mother moved to the UK. At the end of one period of care, the father retained the child in Ontario, and refused to return her to her mother in the UK as required under the parties' separation agreement. The mother applied to the Ontario courts for the child's return to the United Kingdom pursuant to the *Convention*, and argued that pursuant to the parties' agreement, the child's habitual residence at the time she was retained in Ontario was supposed to be the UK. The court held that at the time when the child was retained, her habitual residence was actually Ontario, despite the fact that the agreement called for her to be returned to the UK, and that her habitual residence should have been the UK. Accordingly, the *Convention* did not apply. This case suggests that the determination of habitual residence "immediately before the removal or retention" will be strictly interpreted.

The INCADAT analysis of the Permanent Bureau reveals that different approaches are taken to the determination of "habitual residence:"

> The interpretation of the central concept of "habitual residence" has proved increasingly problematic in recent years with divergent interpretations emerging in different jurisdictions. There is a lack of uniformity as to whether in determining habitual residence the emphasis should be exclusively on the child, with regard paid to the intentions of the child's care givers, or primarily on the intentions of the care givers. At least partly as a result, habitual residence may appear a very flexible connecting factor in some Contracting States yet much more rigid and reflective of long term residence in others.
>
> Any assessment of the interpretation of habitual residence is further complicated by the fact that cases focusing on the concept may concern very different factual situations. For example habitual residence may arise for consideration following a permanent relocation, or a more tentative move, albeit one which is open-ended or potentially open-ended, or indeed the move may be for a clearly defined period of time.[43]

As the INCADAT summary suggests, some jurisdictions take an objective, child-centered approach, and others take an approach that relates more to the intentions of each of the parents.

A number of appellate decisions from the United Kingdom, most recently the 2014 U.K. Supreme Court decision in *L.C. (Children) (International Abduction: Child's Objections to Return), Re*,[44] have held that, at least for older children, the test for habitual residence is whether the "place reflects some degree of integration by the child in a social and family environment," and the child's "state of mind" is an important factor. In that case, there were four children aged 3 to 11 at the time of separation. Until separation, they had lived their entire lives in England. Upon separation, the mother, with the implicit consent of the father, took the children to live with her and the maternal grandmother in Spain. The children lived in Spain for five months and then returned to England to visit their father; once there, they expressed a strong desire to stay with him in England. The mother commenced a *Hague* application in England. At trial, a court-appointed social worker who had interviewed the children testified that the three older children were unhappy in Spain and wanted to stay in England, but the trial judge concluded that the children shared their mother's habitual residence in Spain and ordered their return. The Supreme Court ordered a rehearing on the issue of whether the three older children ever became habitually resident in Spain, and, if they were not habitually resident there, what effect this would have on the fourth and youngest child who was very close to his older siblings. The fact that their mother had custody and was habitually resident in Spain when the children were retained in England by their father was not determinative of their habitual residence. Although the child's "wishes" were not a factor in determining "habitual residence," the fact that they did not feel settled in their new schools and did not feel that they had a real home in Spain, was significant. The Supreme Court remitted the matter for the trial court to consider the children's "state of mind" in determining whether they had settled in Spain. This consideration of the children's attitudes about their residence seems to be a more appropriate, "child-centric" approach to "habitual residence."

(g) "Under the Law" of the Child's Habitual Residence

Article 3 provides that the court hearing a *Convention* application determine whether there were "rights of custody" that were actually being exercised "under the law of the State in which the child was habitually resident." This requires determining whether there are any statutory or common law rules in that jurisdiction about custody rights when parents separate.

If there is a valid agreement or a court order dealing with custody from the jurisdiction of the child's habitual residence, proof of the law of the habitual residence is not likely to be an issue, though there may be a question about interpreting the order or agreement to determine whether a parent has rights of custody pursuant to it. In cases in which there is no outstanding order or agreement at the time the child is removed or retained, however, the court hearing the *Convention* application will be required to determine whether, pursuant to the law of that place, the left-behind parent had "rights of custody."

Article 14 allows a court hearing a *Convention* case to take judicial notice of the law of the jurisdiction of habitual residence without having expert evidence about that law.. This provision allows a more expeditious and less expensive process for determining foreign law, in particular for establishing whether a parent has "rights of custody" under the law of the jurisdiction of the child's habitual residence. Many jurisdictions have statutes on-line, making it easy to determine the legislation of the habitual residence,[45] though in some cases the law may have to be translated into English or interpreted. Judges sometimes rely on letters or affidavits from lawyers who are practicing in the child's habitual residence or qualified to practice there.[46] Sometimes Canadian counsel establish foreign law by submitting case law from the jurisdiction of the

habitual residence of the child.[47]

Article 15 of the *Convention* provides that the court in a requested state may require the applicant to obtain an opinion from a court in the requesting state as to whether, pursuant to the law of the requesting state, the child was wrongfully removed. The Central Authorities in both states are to cooperate in obtaining such an opinion, if it is sought by the court in the requested state. It is not clear what evidence and argument should be considered by the court before it renders the opinion, and whether the responding party (the party resisting the *Convention* application) has the right to appear and provide evidence and argument as well.

The 2012 British Columbia case of *Johnson v. Jessel*[48] considered the process that courts should follow when providing an opinion under Article 15. The children had been taken from British Columbia to Germany by the mother, who had an interim custody order from a British Columbia court. The left-behind father brought a *Hague Convention* application in Germany, and the German court asked the father to obtain an opinion from a British Columbia court as to whether the removal of the children from British Columbia was "wrongful" under the law of the province. The British Columbia Supreme Court heard the application, based on the father's evidence and argument alone, and without proper notice to the mother. The B.C. Ministry of the Attorney General (the Central Authority in the children's habitual residence) was, at the request of the court, involved in the proceedings as an *amicus curiae* to help ensure that there was a fair hearing of the issue. The mother's appeal of the merits of the decision was heard on an expedited basis by the British Columbia Court of Appeal, which affirmed the lower court ruling that there had been a wrongful removal.[49] Given the weight that such an opinion is likely to carry in the requested state, it would generally seem appropriate for both parties and the Central Authority in the jurisdiction of the child's habitual residence to be given notice and the opportunity to present evidence and argument on an application for an opinion under Article 15. While there is urgency to *Hague* applications in general, and Article 15 requests in particular, there are concerns about such proceedings being done *ex parte*. Involving the Central Authority as an *amicus curiae* or intervener may provide some assurance of a proper hearing of the issues.

Some Canadian cases have misconstrued the purpose of Article 15. This Article is intended to give *the court* in the requested state a means to obtain a judicial opinion from a court in the requesting state as to whether the removal of the child is considered "wrongful" in the child's home jurisdiction. It does not give the applicant the right to seek a declaration from a court in the jurisdiction of habitual residence; in some cases, however, applicants have used Article 15 to try and obtain a "declaration" from the court that the removal of a child was wrongful.[50] This is not the correct use of Article 15.

(h) "Actual Exercise of Custody Rights"

Article 3(b) provides that the *Convention* only applies if the left-behind parent was "actually exercising" rights of custody at the time of the removal. Just as courts have defined "rights of custody" pursuant to the *Convention* broadly, so they have also defined the term "actually exercising" broadly. "Some involvement" with a child will usually be enough to meet the test for actually exercising rights of custody.[51] In the Quebec case of *Droit de la famille — 111933*[52] the father's telephone contact and very occasional visits with the children were considered sufficient to satisfy the requirement of "actually exercising custody rights" for a parent who shared a lawful right to custody.

In *Savard v. Fern*,[53] the court went further and held that the non-residential mother who appeared to have given up her expectation of regular contact with the children at the time that they were removed by the father from England was still exercising "rights of custody" for the purposes of the *Convention*. It was apparent that the mother had consented to the children coming to Canada for a visit with the father. The issue was whether she had consented to them staying in Canada. She had given the father travel documents for the children, knowing that the father was going to take them to Canada. Once he brought the children to Canada and indicated an intent to stay, however, the mother sough the assistance of Central Authority in the UK, which then requested the Central Authority in New Brunswick to seek the return of the children. The court held that "nothing had been settled yet" regarding custody and access, and that the mother therefore had "rights of custody" that she "would have exercised" but for the father removing the children to Canada; the court ordered the children's return to the UK, but imposed conditions to ensure that their care would not be immediately disrupted upon their return to England.

It appears, therefore, that once it is established that the parent has a "right of custody" pursuant to the law of the place of habitual residence of the children, it is usually not much of a hurdle to establish that a parent is *actually* exercising rights of custody.

(i) Article 12 and the One-Year Limit

Article 12 of the *Convention* presumptively requires the return of a wrongfully removed or retained child if the proceedings are commenced within the year, but allows that if proceedings are not commenced within a year after removal the court has the discretion not to return a child who has "settled" in the new jurisdiction:

> **Article 12**
>
> Where a child has been wrongfully removed or retained in terms of Article 3, and, at the date of the commencement of the proceedings before the judicial . . . 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 forthwith. The judicial . . . authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

If the period of one year has expired before the application is brought, the parent resisting the return of the child should adduce evidence about the child's school, friendships, and connections to the community to show that the child is "settled" in the new jurisdiction. In *S. (A.E.) v. W. (A.M.)*[54] the Alberta court considered a *Convention* application by the father to return the 6-year old child to California, the couple's last common habitual residence. The application was commenced more than a year after the mother and child left California. During that time the mother and child lived briefly in a number of jurisdictions, eventually ending up in Alberta, where the mother's parents resided. The father's application was commenced about 6 months after the child's arrival in Alberta. Justice Jeffrey of the Alberta Court of Queen's Bench was presented with a great deal of evidence about the parents' intentions concerning residence, but relatively little about the child's connections to Alberta. The Court held that in the absence of this evidence, the child should be returned.

In contrast, in *Kubera v. Kubera*[55] the British Columbia Supreme Court justice who heard the original application was provided with considerable evidence about the child's circumstances in British Columbia, and refused the *Convention* application.[56] In August 2003 the mother traveled with the child, then 3 years of age, from Poland, where the child and parents had lived together since the child's birth, to Canada to visit her relatives. The visit was originally to have been for 3 months, but the mother decided to extend her visit, to which the father initially agreed. The father was aware that there were "marital difficulties" which resulted in the mother wanting to stay in Canada, but it was only fifteen months after her arrival in Canada that, the mother, by then in a new common law relationship, advised the father that she wanted to stay permanently in Canada with the child and her new partner. The mother and child obtained refugee status in Canada, based on allegations of domestic violence by the father. In November 2005 the father commenced a *Hague* application with the Central Authority in Poland; *Hague* proceedings were commenced in the British Columbia Supreme Court in April 2006 to return the child to Poland. The application was not heard until 2008. The chambers judge held that the "now settled" exception under Article 12 of the *Convention* applied and, on that basis, dismissed the father's application to return the child to Poland. The Court held that because more than a year had passed since the child had been wrongfully retained in British Columbia, the mother was permitted to introduce evidence as to whether the child was "now settled" in British Columbia, and should not be returned. The Court of Appeal held that if the one year exception in Article 12 applies, judges should take a "child-centric" approach to determining the child's circumstances, stating:

> . . . the factual inquiry seeks to determine the *actual* circumstances of the child in terms of the disruptive effect of ordering his or her return. The exception reflects a compromise between an indefinite extension of the obligation to return the child, and a recognition that the justifications for that obligation do not persist indefinitely. Beyond one year, the interests of a particular child in not being uprooted may begin to outweigh the generalized objectives of the *Convention* . . . . The objective of securing prompt return has been seriously undercut; restoring the status quo may be impossible; it can no longer be presumed that the country of origin is the best forum to determine the issue of custody; and, finally, general deterrence, while much less prone to the passage of time, must also eventually yield to the welfare interests of the particular child.[57]

There was no question the child had been wrongfully retained in British Columbia. The father had taken steps within one year of being finally informed of the mother's plans to remain in Canada to involve the Central Authorities in Poland and Canada to have the child returned. He argued that the delay in starting the process only occurred because the mother "strung him along," telling him that "she loved him while living with another man." However, rather than taking steps to require the return of his child after learning of her plans, he chose to "wait patiently," while he hoped that the mother would "sort out

their marital problems in her mind." Critically, more than a year passed after he had clear notice of the mother's plans to remain in Canada before *Hague* proceedings were commenced. The original trial decision was only made after the child had been in Canada for four years. Some of the delay in scheduling a hearing was a result of the father's changing his counsel in Canada; by the time the appeal decision was rendered, in 2010, the child had been in Canada for six years.

The passage of time in a child's life will inevitably see changes, and the formation of connections to school, community, and friends, and is often more significant for children than the passage of the same time in the life of an adult. If the proceedings are, for whatever reason, not commenced within the year, moving the case to a hearing quickly will be essential to avoid the application of the "now settled" exception. Put simply, the longer a child is in the new jurisdiction, the harder it may become to convince the court to make an order returning the child.

The determination in Canada as to whether a child is "now settled" pursuant to Article 12 may depend, to some extent, on the age of the child. Younger children may be seen as more closely connected to their primary caregiver, and less connected to the community, and accordingly may be viewed as more easily "settled." In *Droit de la famille — 102375*[58] the mother left her home in Mexico and returned to her native province of Quebec in September 2008 when her daughter was 3 years old. The father did not begin a *Hague* application in Quebec until January 2010. In September 2010 the Quebec Superior Court rejected his application. The evidence before the court was that the child was "happy and healthy", and well-settled in Quebec. There was also evidence that she was very attached to her mother. Justice Petras accepted that the child was, in one sense, "settled" in Quebec, but queried whether this was sufficient to meet the "now settled" exception in Article 12, in view of the child's young age, and her close connection with her mother:

> X is five years old. She has lived in Town B and now lives in Town A. She has been attending daycare for only a short period of time. She is not yet in school. At this stage in her life, her security and stability, indeed her world, is her mother. She does not yet have the friendships, ties, and relationships to constitute the type of long term integration necessary to constitute "settlement" in Quebec, as understood under the *Hague Convention* and as determined in the majority of the case law on this issue.
>
> One cannot at this age and even after some 23 months in Canada, really say that X has now been settled or integrated into Quebec/Town A society to a degree sufficient to create the level of interdependence or connection between herself and Quebec/Town A society necessary to trigger the exception contained in article 20 of the Quebec *Child Abduction Act* or article 12 of the Hague Convention.

Justice Petras concluded that the child was not settled in Quebec and dismissed the argument to invoke the Article 12 exception to the *Convention*. However, she concluded that there was a "grave risk" of harm to the child if the court ordered her return to Mexico, because of concerns about physical and sexual abuse of the mother by the father, and invoked Article 13 to allow the mother and child to remain in Quebec, a decision affirmed by the Quebec Court of Appeal.[59]

The INCADAT case law analysis of the Permanent Bureau notes that there is some inconsistency between courts in different countries in determining whether a child is "now settled." Courts in some jurisdictions have taken the approach that the burden on the parent who has removed the child to establish settlement is "a heavy one," while others appear to have taken the approach that it is fairly easy to establish that a child is settled, once the one-year time limit has passed. One factor in these cases may be whether the left-behind parent knew, or could reasonably have discovered, where the child was. If the abducting parent and child are in hiding and the left-behind parent does not even know where to commence a *Hague* application, this suggests that the child was less settled and makes it less fair to invoke Article 12.

4. ARTICLE 13 — EXCEPTIONS TO RETURN

Article 13 of the *Convention* establishes some important exceptions to the obligation of return:

> **Article 13**
>
> Despite the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposed its return establishes that:
>
> (a) The person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of the removal or retention, or had consented to or subsequently acquiesced in the

removal or retention; or

(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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

If it has been determined that a child has been wrongfully removed or retained, the main "defences" are in Article 13 of the *Convention*. Like Article 3, this is a dense provision, and has been subjected to significant judicial interpretation. There is now more litigation under this provision than any other Article of the *Convention*.

(a) Consent or Acquiescence: Article 13(a)

The Ontario Court of Appeal held in *Katsigiannis v. Kottick-Katsigiannis* that the terms "consent" and "acquiescence" in Article 13 of the *Convention* are to be construed using their usual and ordinary meanings:

> The words "consent" and "acquiescence" as used in Article 13(a) of the Hague Convention should, in my view, be given their ordinary meaning so that they will be consistently interpreted by Courts of Hague Convention contracting states . . . . I can see no logical reason not to give those words their plain, ordinary meaning.
>
> "Consent" and "acquiescence" are related words. "To consent" is to agree to something, such as the removal of children from their habitual residence. "To acquiesce" is to agree tacitly, silently, or passively to something such as the children remaining in a jurisdiction which is not their habitual residence. Thus, acquiescence implies unstated consent.[60]

In *Ibrahim v. Girgis*[61] the Ontario Court of Appeal explained that some delay in commencing a *Convention* application does not in itself constitute consent or acquiescence, particularly if the *Convention* application was filed within one year of the child being removed from the habitual residence. MacFarland J.A. pointed out that if the application is within the one year, there is no basis in the wording of the *Convention* itself for inferring consent or acquiescence, as Article 12 allows the court to consider that issue only in cases commenced later than one year after the removal.[62]

The onus is on the parent resisting the *Convention* application on this ground to prove, on a "balance of probabilities;" that the children were removed or retained with the consent or acquiescence of the other. However, the parent applying for the children's return is well advised to explain in the application the circumstances of removal or retention, and if this defence is raised to adduce as much evidence as possible about the circumstances of the children's departure from the jurisdiction of habitual residence. It may be relevant that the removing parent engaged in subterfuge, perhaps by only packing a few items, and not all of the children's items, so as to fool the left-behind parent into thinking the trip was temporary. Written communications, such as e-mails, may be important to support the left-behind parent's version?[63]

(b) "Grave risk" of harm or other "intolerable situation:" Article 13(b)

The concept of "grave risk" of harm in Article 13(b) includes situations such as where there is a war, serious civil unrest or a natural disaster in the jurisdiction of habitual residence, but also where the applicant has been abusing the child. An increasingly frequently litigated issue arises when the parent (invariably the mother) who removed the child has been the victim of domestic violence perpetrated by the left-behind parent, or claims to have been the victim of domestic violence, and that she cannot be adequately protected in the jurisdiction of the child's habitual residence and the child.[64]

In *Thomson v. Thomson*[65] the Supreme Court of Canada emphasized that because the *Convention* uses the term "grave risk," it has to be something "more than ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another," and that if the risk is of psychological harm, it has to be "substantial, and not trivial." While the risk needs to be "grave," it need not be "immediate."[66]

Domestic violence against a parent (invariably the mother) may be considered to create a "grave risk" of harm to the child if it places a child's primary caregiver at risk or creates a risk of the child being exposed to further spousal violence. In *Pollastro v. Pollastro* Abella JA, writing for the Ontario Court of Appeal, stated:

> Although every case depends on its own facts and the onus remains on the person resisting the child's return, it seems to me as a matter of common sense that returning a child to a violent environment places that child in an inherently intolerable situation, as well as exposing him or her to a serious risk of psychological and physical harm.[67]

While it is accepted that domestic violence can satisfy the requirements of Article 13(b), litigation under this provision often revolves around credibility and proof, and around the issue of whether the courts and police of the jurisdiction of habitual residence have the willingness and ability to adequately protect the victim parent and children.

In *Achakzad v. Zemaryalai*,[68] Murray J. of the Ontario Court of Justice discussed the test for "grave risk of physical or psychological harm" or "intolerable situation," particularly in the context of domestic violence; the decision illustrates the importance of proof if the harm alleged is domestic violence. The case was a *Hague* application by a father. The mother took the six-year-old child from California to Ontario, and refused to return to California, alleging that the father had beaten her and threatened her. There had been criminal charges laid in California, but the charges did not proceed. The mother had photos of the injuries she suffered as a result of the assaults by the father, which were convincing proof of the abuse. The court dismissed the father's *Convention* application for the return of the child.

Justice Murray noted that it is important that courts in signatory countries have a consistent interpretation of Article 13(b). She therefore referred extensively to international case law.[69] Once the child has been found to have been wrongfully removed, the onus is on the parent claiming the exception to establish the basis for it. Courts should presume that other signatory states can make proper arrangements for the protection of children and parents. In order to defeat an application for the return of a wrongfully removed child, the parent who removed the child will have to demonstrate that the potential for harm is such that this presumption is overcome. The court will therefore require a proper factual foundation to overcome the presumption.

An interesting aspect of this case is that the father argued that the assaults were unproven, but more importantly, that even if they were true, the assaults on the mother were not sufficient to establish that the child would be at "grave risk" of harm if returned. The mother's position was that the domestic violence created a grave risk for the child, because she had witnessed some of it, and that it would likely continue if the mother and child were returned to California. The father proposed that if the child were returned, he would submit to undertakings that would address any safety concerns.

As discussed below, judges hearing cases under Article 13(b) try to distinguish cases where there is a pattern of coercive controlling violence from cases in which some less serious or less systemic violence may have occurred. There are cases in which the domestic abuse is substantiated, but that may yet result in a child being returned. These are cases where the assaults are relatively minor, or isolated, or where there may have been mutual abuse and the parent who has moved with the child does not demonstrate any real fear of the parent who committed the assaults. In cases in which the court finds that there has been substantiated violence that is coercive and controlling, and is likely to reoccur or cause genuine fear if the custodial parent and child are required to return, judges will be unlikely to return a child.

In *Achakzad v. Zemaryalai* there was a long-term pattern of physical abuse, threats and control against the mother that was quite extensively documented. It was significant that the court found that the left-behind parent had not "admitted his past wrong-doing," so there was therefore a significant risk that the violence would be repeated. Justice Murray concluded that "a risk of harm" to the mother, as the child's "primary caregiver, would constitute a risk of harm to the child."[70] Further, in considering whether the risk is "grave," the court must consider both the seriousness of the potential harm and the likelihood that the harm will occur.

The issue of domestic violence in the context of Article 13(b) of the *Convention* was also considered recently by the Ontario courts in *Husid v. Daviau*.[71] The parents had married and lived in Peru, where the father was a citizen, while the mother retained her Canadian citizenship. The parties separated in Peru in 2008, when their daughter was 2 years old, and engaged in what the court described as "hostile litigation" in Peru. In September 2010 the mother obtained a temporary order in Peru allowing her to bring the child to Canada for a visit to see the mother's family. She came to Ontario and decided not to return to Peru with the child. The father commenced a *Convention* application in Ontario. The mother admitted that the child had been wrongfully retained in Ontario, but alleged that the father had been physically and emotionally abusive to her and

sought relief under Article 13(b). The father denied the abuse, and argued that the presumption that signatory states to the *Convention* can manage difficult cases should prevail, and the child should be returned.

The *Hague* application in Ontario was heard by way of trial, and both parties testified about the court proceedings in Peru. In addition, there was evidence from Peruvian lawyers about the justice system in Peru and the practice of family law there. The decision of Perkins J. characterized the parties' litigation in the Peruvian courts as a "confusing thicket of different cases in different courts, all going on at once."[72]

As with other cases in which domestic violence is alleged as the basis for the Article 13(b) exception, the quality and quantity of evidence about the alleged abuse was important. Justice Perkins found the mother and her witnesses to be credible, despite what he described as "minor discrepancies" between their evidence in Ontario and the evidence that they had given in earlier proceedings in Peru. The judge did not find the father or his relatives to be credible witnesses. He found that the father had been violent and threatening to the mother, including threatening to shoot her with his handgun. The court found that the father on more than one occasion touched the pouch in which he had his handgun, while saying that Peru was "a corrupt country and you never know what can happen," that the mother should "watch her back," and that if the child "isn't with me, she won't be with anybody."[73] The child had also suffered some unexplained injuries while in the father's care, prior to the mother removing the child from Peru; while the court did not make a finding as to whether the father had caused these injuries to the child, the father's inability to give a satisfactory explanation no doubt influenced the court, and the court accepted that the child had witnessed her mother being abused by the father and was afraid of him.

Justice Perkins articulated the test for the application of Article 13(b) as follows:

> Bearing in mind that the burden under article 13(b) is on the mother in this case, the evidence must be clear and convincing, the risk must be substantial, the harm must be substantial or severe (if not intolerable), an intolerable situation is one this particular child in these particular circumstances should not be expected to tolerate and there is not to be an expansive application of article 13(b) focusing on [the child's] best interests, has the mother met the test of the convention and the cases?[74]

Given the extensive evidence before it and its findings on the credibility issues, the court answered this question in the affirmative.

It is notable that in this case the mother's counsel introduced evidence about the child's circumstances in Canada. Father's counsel objected to this evidence being admitted, on the basis that it wandered into "best interests" territory, and had nothing to do with the Article 13(b) exception. The court ruled, however, that it was important to know what the child's circumstances in Canada were "in order to have the full picture before me on the issue of what harm she might suffer if returned to Peru." In explaining the relationship between evidence about a child's best interests and Article 13(b), Perkins J. quoted with approval this passage from a leading precedent in the United Kingdom, *E (Children) (Abduction: Custody Appeal), Re*:

> In the assessment of an Article 13(b) defence the court's focus must be on the child's interests in the sense of evaluating whether the return would entail specific risks and not on the child's wider welfare within the context of the underlying family problems and disputes, which have probably given rise to the abduction and which will have to be investigated and addressed after the child's return . . . , the judge evaluating grave risk of harm in the context of an Article 13(b) defence must weigh the immediate and not the ultimate best interests of the child.[75]

Justice Perkins also quoted with approval a passage from the 2006 decision of the House of Lords in *D (a child), Re*:[76]

> . . . The authorities of the requested state are not to conduct their own investigation and evaluation of what will be best for the child. There is a particular risk that an expansive application of article 13b, which focuses on the situation of the child, could lead to this result. Nevertheless, there must be circumstances in which a summary return would be so inimical to the interests of the particular child that it would also be contrary to the object of the Convention to require it. A restrictive application of article 13 does not mean that it should never be applied at all.

While it may not strictly be necessary to know a child's current circumstances in order to decide whether returning her would place her at grave risk of harm, the Ontario court was willing to consider the child's current circumstances to meet its fundamental obligation to ensure that the child would be safe if left with her mother in Canada. The weight that the court attaches to such evidence of present circumstances is more the issue than whether it ought to be admitted in evidence. In this case, the child's current circumstances bore very little relevance on the outcome. The decision of Perkins J. rested on his

assessment about the father's history of brutalizing the mother and its effect on the child.

The decision of Perkins J. was affirmed by the Ontario Court of Appeal in a relatively short judgment, where Ducharme J.A. summarized the law concerning "grave risk:"

> [T]he risk contemplated by the Convention need not come from a cause related to the return of the child to the other parent, as opposed to merely from the removal of the child from his or her present caregiver. In other words, from a child-centred perspective, harm is harm. If the harm meets the stringent test of the Convention, its source is irrelevant . . . Article 13(b) is available to resist a child's return when the reason for the child's removal is violence directed primarily at the parent who removed the child: "returning a child to a violent environment places that child in an inherently intolerable situation, as well as exposing him or her to a serious risk of psychological and physical harm."[77]

The appellate court concluded that the findings of the trial judge "paint the picture of a violent family dynamic, a dynamic capable of supporting the trial judge's conclusion that there is a grave risk the child's return would expose her to physical or psychological harm or otherwise place the child in an intolerable situation."[78]

Husid v. Daviau raises a common problem: how should Canadian courts deal with situations where the justice system in the jurisdiction of the child's habitual residence has laws prohibiting domestic violence, but the police and courts in that jurisdiction are not in fact adequately protecting the parent and child? The Quebec Court of Appeal has indicated that Article 13(b) can be invoked when "the local authorities have shown an unwillingness or inability to respond and to protect the mother."[79] This seems an appropriately pragmatic and child-centered approach. No country has a justice system that can provide a guarantee of safety against an abusive partner who is not willing to comply with court orders. In dealing with *Hague Convention* cases and the future risk that is posed to the child and caregiving parent if the child is returned, account must be taken of the nature and history of violence, the actual responsiveness of the police and courts in the child's jurisdiction of habitual residence to this abuse, as well as the likelihood that the abuser will respect court orders or undertakings.

(c) Child's Objections to Return: Article 13

Article 13 also allows a court to take into account a child's views as an exception to the automatic return mandated by Article 12, provided that the court "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." This might appear to be a fairly wide exception to the mandatory return rule. However, as with the other exceptions set out in Article 13, the provision is narrowly interpreted; the onus is on the parent asking for the exception.

The courts recognize that if a child has been taken by one parent and had little or no contact with the left-behind parent for a significant period of time, the child is likely to express a preference for continuing to reside in the new jurisdiction with the parent who wrongfully removed or retained the child, so a mere preference is not sufficient: there must be an "objection" to return from a "mature child."

In the 2005 Ontario case of *Riedel v. Thomopoulos-Danilov*[80] Seppi J. noted that the burden is "substantial." The eleven-year old boy in this case had been taken by his mother from California to Ontario, and there was evidence that he wanted to remain with her in Ontario. The evidence that the mother provided about the child's wishes included video recordings that she had taken, as well as evidence of a custody evaluator from California who had previously prepared a report in the case and interviewed the boy on the phone while he was in Ontario. The court held that the evidence confirmed that the eleven-year old boy was influenced by his mother, and ordered his return to California where his father had custody. The Ontario Office of the Children's Lawyer was not involved, and there were no independent experts in Ontario who interviewed the child, but there were custody evaluations from California indicating that the mother had a history of attempting to manipulate her children.

In *B. (G.) v. M. (V.)*[81] Murray J. dealt with a case where a 14-year old child had been removed from Hungary by the mother. At the time the mother left, there was on-going custody litigation in Hungary. After the mother left, the father obtained a final custody order in Hungary. The mother applied for refugee status in Canada, for herself and the child, based primarily on the fact that she was Roma (gypsy). She took the position that even if the child had been wrongfully removed, the child now wished to remain with her, and the child was of an age at which the child's wishes should be respected. The child was represented by the Ontario Office of the Children's Lawyer (OCL). The hearing was conducted expeditiously on the basis of affidavit evidence, including an affidavit from the OCL clinical investigator about the child's views indicating that the child

expressed a wish to remain with the mother in Canada but had been evidently influenced by the mother. The mother's argument about "grave risk of harm" rested on the psychological trauma that would occur if the child were separated from her (and her new husband), and the child's half-siblings. She further argued that as a result of her work as a prominent Roma activist in Hungary, the child would be bullied by other children in that country if returned.

Justice Murray accepted that there is a rebuttable presumption that contracting states are capable of protecting the parties and children appropriately if they are returned. The judge indicated that rebutting this presumption will not be easy, and that the onus lies with the parent who removed the child. At the same time, the court considered evidence as to whether the Hungarian legal system would protect both the child and the parent. The court concluded that it would, on the basis that the system is similar to the one in Ontario, and includes representation for children in appropriate cases. Most importantly, the judge found that the Hungarian courts would determine the custody issues based on the child's best interests, just as Ontario courts do. Finally, the court held that the fact that a refugee claim was underway did not require that the *Convention* application should be delayed. The court ordered the child returned, on the condition that the father undertook not to enforce his custody order, and to allow the issue of custody to be re-opened in Hungary upon the child's return.

This case demonstrates the important role that the clinical investigator of the Office of the Children Lawyer, or a similar independent court-appointed mental health professional, can play in cases in which the child's wishes are proffered as the basis for an Article 13 exception. The OCL here became involved at the request of the court and completed a thorough investigation in four months. The investigation provided the court with objective and balanced evidence about the child's expressed wishes, and the context for those wishes.[82]

The British Columbia Supreme Court in *Beatty v. Schatz* also took a narrow approach to the scope of the child's objection exception.[83] Justice Martinson held that it was unfair to the child and contrary to the policy intentions of the *Convention* to allow the child to effectively make the decision:

> A. was ten when his father placed the responsibility of what should happen on his shoulders. He just turned 11 . . . . Though he is obviously bright and can express what he wants to do and why, he is not mature enough to understand the subtleties of what is happening and their long-term consequences on his well-being.
>
> This is a case where the policy considerations underlying the *Hague Convention* are particularly important. As the [House of Lords] said in *Re M.*, the *Hague Convention* is there not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting States.[84]

The recent Alberta case of *R.M. v J.S.*, also illustrates the high onus of proof for raising a defence under Article 13 based on the child's objections, and provides guidance for how evidence about a child's maturity and objections are to be introduced. The mother and father were Palestinian Muslims, living in East Jerusalem. They married and had one child, a son. The parties separated, and were subsequently divorced in the Sharia Court of Jerusalem; no provision was made for custody of the son but it was accepted that the mother had *de facto* custody. The father immigrated to Calgary, while the mother and son continued to reside in Jerusalem, on the understanding that the son would spend his summers with the father. After the father failed to return his then 9 year old son to his mother in Jerusalem after a summer visit, the mother brought an application under the *Hague Convention* for the boy's return.

At the trial, there was affidavit evidence from both parents. The trial court also appointed counsel to represent the interests of the child.[85] Counsel for the child made submissions, reporting that after interviewing the child on two occasions, utilizing a series of questions provided by a psychologist, counsel concluded that the child, then 10 years of age, objected "to being returned [to Jerusalem] and has attained an age and degree of maturity at which it is appropriate to take account of its views" within the meaning of Article 13 of the *Hague Convention*. Child's counsel concluded that the boy was not subject to undue influence from the father, and was "mature for his age, bright and articulate when it came to describing his concerns about returning to Israel," noting that as a Palestinian youth he often felt unsafe and bullied in Israel. At trial, counsel for both the child and the father raised arguments about "grave risk" and the "child's objections." The judge accepted that there had been a wrongful retention, and rejected the grave risk argument, but accepted the child's objection argument, and accordingly refused the application. The mother appealed to the Court of Queen's Bench, which gave deference to the trial judge's finding and denied her appeal.[86]

In December 2013 the Alberta Court of Appeal allowed an appeal and directed that the child be returned "forthwith" to the

mother in Jerusalem.[87] The Court of Appeal quoted its 2006 decision in *Den Ouden v. Laframboise*, in which the Court considered a case of two children, aged 14 and 10, who objected to being returned to Holland. The basis of the children's objection was that they enjoyed their new school and friends in Alberta, and did not wish to have their lives disrupted by a return order. The Court of Appeal in *Den Ouden* ordered the return of the children, stating:

> These feelings are completely understandable and not unexpected. The mother has continued to devote herself to their care and has provided well for her children. However, to exercise the court's discretion permitted by Article 13, and give effect to feelings of children who find themselves in such situations would undercut the fundamental objective of the Hague Convention. That would lead other parents to believe that they may abduct their children, go to another country, settle there, and then rely on their children's contentment to avoid being returned to the jurisdiction which should properly deal with their custody and residence. We cannot encourage such conduct.[88]

The Court of Appeal in *S. (J.) v. M. (R.)* expressed concern that the trial judge:

> seemed to treat the child's objection as controlling. While he found that he child's objection was not coerced, nor otherwise improperly influenced, the evidence and matters he took into account in coming to that conclusion were also missing from his decision. There is also the concern that, in weighing the elements of the child's objection, which spoke to the child's preferences and hopes, the Provincial Court judge fell into forming a conclusion about the child's best interests. The policy of the Convention is that the courts of signatory nations are credited with the ability to address best interests appropriately.. In short, the objects and policy considerations underlying the *Hague Convention* appear to have been overridden, without a proper evidentiary basis.[89]

The Court of Appeal in *S. (J.) v. M. (R.)* was clearly concerned that the trial judge considered that a ten-year old child could have sufficient "maturity" to make this decision. However, the appellate decision was not based on a reversal of the trial judge's conclusion on this issue, but rather rested on the fact that the trial judge based his findings about the boy's "objections" on the submissions of the counsel for the child and did not have evidence from a mental health professional. In the view of the appellate court, counsel for the child

> did not provide a proper evidentiary basis for the court to assess the maturity of the child, nor to assess his views [to establish] if he was sufficiently mature to have them considered. In saying so, we make no criticism of counsel for the child whose duty it was to represent him . . . counsel, though well versed in the law, did not demonstrate that they possessed any specialized expertise in understanding and analyzing the thoughts of young children."[90]

The Alberta Court of Appeal cited the 1994 Ontario Court of Appeal in *Strobridge v. Strobridge*,[91] which also held that counsel for a child cannot "give evidence" while making submissions. Accordingly, there was no evidentiary foundation for the trial judge's ruling. The Alberta Court went on to state that evidence about the child's wishes and views should be put before the court by a social worker, psychologist, or other child-care professional who has interviewed the child. Such a clinician can then be cross-examined by all of the parties, ensuring that the evidence is fairly tested. The Alberta Court of Appeal held that in the absence of *express consent* from the other parties, counsel for a child cannot state the children's views and preferences, as counsel cannot occupy the dual role of advocate and witness.

In its recent decision in *L.C. (Children) (International Abduction: Child's Objections to Return), Re*,[92] the UK Supreme Court also emphasized the importance for a *Hague* application of having an independent mental health professional provide evidence about a child's views and experiences; in that case the central issue was whether the children's "state of mind" was such that they had adopted a new habitual residence. There is much to commend the approach of these courts in requiring evidence from a mental health professional about a child's views and preferences, so that there is a possibility to challenge or qualify this evidence. However, until the decision of the Alberta Court of Appeal in *R.M. v J.S.*, the widely followed practice in that province for any case involving the care or custody of children was for counsel appointed for a child to present the child's views and perspectives through submissions. It seems unfair to the child involved to have ordered his return rather having than an expedited rehearing with properly admissible evidence from an independent mental health professional about his objections.

5. UNDERTAKINGS AND CONDITIONS FOR ORDERS OF RETURN

Although not provided for in the wording of the *Convention* itself, the imposition of undertakings or conditions for return can play an important part in allowing courts to meet the objective of the *Convention* of returning children to their jurisdiction of habitual residence while minimizing disruption and risk to the child. Undertakings may be sought from the left-behind parent as a condition of a return order in Canada to ensure that the child and the parent who removed the child are protected if the

child is returned. There may also be undertakings to ensure that the left-behind parent will not try to assert an unfair advantage in the litigation in the home jurisdiction, for example by trying to enforce a chasing order made after departure of the child or by instituting criminal proceedings against the parent who wrongfully removed the child.

The Supreme Court of Canada in *Thomson v. Thomson* explained the value of undertakings.[93] In that case the child was under a year old, and had been taken from Scotland by the mother to Manitoba, where her family resided. After the child's departure, the father obtained a "chasing order" in Scotland, granting him interim custody, and commenced a *Convention* application in Canada. The Canadian courts did not find that any of the *Convention* exceptions to return applied, but the central issue was that if the child were returned, the father's chasing order would prevail and he would obtain immediate custody; as a result the parties would not have been put back into the position that they would have been in had the mother not removed the child, and the welfare of the child might be prejudiced. The Supreme Court therefore accepted the father's undertaking not to enforce his chasing order:

> Given the [Convention's preamble] statement that "the interests of children are of paramount importance," courts of other jurisdictions have deemed themselves entitled to require undertakings of the requesting party provided that such undertakings are made within the spirit of the Convention. . . . Through the use of undertakings, the requirement in Article 12 of the Convention that "the authority concerned shall order the return of the child forthwith" can be complied with, the wrongful actions of the removing party are not condoned, the long-term best interests of the child are left for a determination by the court of the child's habitual residence, and any short-term harm to the child is ameliorated.
>
> Mr. Thomson has offered the following undertakings through his solicitors which this Court has accepted:
>
> > (a) He will not take physical custody of Matthew upon Matthew's return to Scotland and not until a Court permits such custody.
> >
> > (b) That he will commence such proceedings as will enable the Court of competent jurisdiction in Scotland to determine within approximately 5 weeks of Matthew's return on an interim or final basis, the issue of Matthew's care and control.[94]

Since *Thomson*, undertakings and conditions have often been used by Canadian judges to address chasing orders or to secure appropriate travel arrangements for the children and taking parent.[95] In the course of *Convention* proceedings, it will often be useful for each parent to make submissions as to what would be appropriate travel, support and accommodation arrangements for the child and parent travelling with the children pending resolution of custody by the courts in the jurisdiction of habitual residence.[96] It is important for the Canadian court to make clear that such conditions are terms of the order for return, even though the Canadian court will not have jurisdiction to enforce the terms once the child is returned. In some cases, counsel for the taking parent may be satisfied simply with the making of an undertaking by the left-behind parent, as the failure to honour it may significantly influence any proceedings in the jurisdiction of habitual residence. In other cases, counsel for the taking parent will want to ensure that the terms are followed, perhaps, by the making of a "mirror order" by the court in the requesting jurisdiction; as discussed below a "mirror order" is an order, usually made on consent, made by a court in the requesting state adopting the conditions imposed by the court in the requested state ensuring the enforceability of these conditions upon the return of the child. The effect of undertakings and conditions in the requesting state should be the subject of discussion between counsel in the two jurisdictions, and perhaps communication between the courts.

(a) Communication between Judges of Contracting States

The *Convention* does not contain provisions concerning communication between the courts in the requested and requesting states, but many contracting states have appointed "liaison judges" who receive special training on *Convention* cases, and who are designated to facilitate such communication. The Canadian Judicial Council[97] has designated such judges, and many other signatory states have done the same. "Liaison judges" from contracting states serve on the International Hague Network of Judges, and facilitate communication between courts for *Hague Convention* cases.[98]

Communication between courts may facilitate co-ordination of proceedings, reduce the costs of concurrent proceedings in different jurisdictions, and help to ensure that courts have the information needed to make appropriate decisions. The Secretariat of the Permanent Bureau of the *Hague Convention* has encouraged the practice of having a judge dealing with an application in a requested state communicate with a judge dealing with the same case in the requesting state, with communications facilitated by Hague "liaison judges" in each jurisdiction.[99] Communications are expected to be "on the

record," with appropriate notice and involvement of the parties. The communications may be done by way of a conference call. The judges will normally do the talking, but each judge should receive submissions from the parties before the call, and the parties are entitled to hear the communication, and intervene as appropriate. The purpose of this communication is not to have judges advocating particular outcomes, but to allow understanding of the state of proceedings in the other jurisdiction, and co-ordination that will promote the interests of children and minimize expense. This communication may facilitate giving effect to undertakings, sometimes through the making of a consent "mirror order" by the court in the requesting state, adopting the conditions of return and ensuring their enforceability in the requesting state. An alternative method of communication may be emailed correspondence between the judges, with copies to all parties and counsel in both jurisdictions; counsel in each jurisdiction should have an opportunity to make email submissions to the judge in their respective jurisdictions, with copies to all involved.

In *Husid v. Daviau*, discussed above on the issue of domestic violence allegations and the applicability of Article 13(b), the court also considered questions relating to undertakings and judicial communication. Justice Perkins J. noted that even though he was satisfied that the mother had met the onus of establishing an exception to the return of the child in Article 13(b) from Canada to the child's habitual residence in Peru, the court still had to explore all of the ways in which a return of the child might yet be accomplished through the use of undertakings. In the course of reviewing available undertakings, Perkins J. considered whether any undertakings regarding the mother's safety would be obeyed, and whether there were other options that might allow for the return of the child:

> It seems to me there are four possible options for dealing with this case, now that I have found the mother has met the threshold in article 13 (b):
>
> 1. Enter into direct communication with the Peruvian liaison judge appointed to deal with Hague Convention cases to discuss how to proceed and to explore the possibilities under option 2 or option 3 below that would be enforceable in Perú.
>
> 2. Consider and adopt appropriate undertakings to be required of the father before ordering the child to be returned to Perú, so as to eliminate or alleviate risks of harm to the child or of an intolerable situation for the child.
>
> 3. Consider and adopt appropriate temporary orders designed to eliminate or alleviate risks of harm to the child or of an intolerable situation for the child.
>
> 4. Decline to order the child's return because undertakings or temporary orders cannot be expected to eliminate or alleviate risks of harm to the child or of an intolerable situation for the child.[100]

Justice Perkins decided not to accept any undertakings from the father due his finding that the father's evidence lacked credibility, largely because of the level of violence and his threatening behavior; further, it was not just the father who was involved in the violent behavior towards the mother, but other members of the father's family as well. It is also interesting that the court decided not to attempt direct judicial communication with the courts in Peru, to discuss how undertakings (and perhaps orders) might have been employed to protect the safety of the child. On the basis of his finding that many of the Spanish documents had been poorly translated, Perkins J. decided not to contact the Peruvian liaison judge:

> . . . my experience with the translation and interpretation in this case as well as my general experience over the last 16 years in Ontario courts tells me that language and terminology issues can pose significant problems and the translation and interpretation resources to deal with them are often lacking . . . Nonetheless I would certainly consider such direct communication in an appropriate case, even if the other jurisdiction involved used a different language from our official languages and had a different legal system. However . . . I have concluded that the assistance of the Peruvian liaison judge would not provide an answer to the real problems in this case.

The Ontario Court of Appeal affirmed that the trial judge did not err in failing to contact the Peruvian courts, though by implication it would have been permissible (and perhaps even advisable) to do so. Ducharme J.A. commented:

> there is no absolute requirement for interstate dialogue under the Convention, nor did the trial judge inappropriately or unfairly assess the Peruvian justice system in his analysis.[101]

There is a rebuttable presumption that the justice system of the requesting state is capable of addressing issues regarding the safety of the parties and the child. As part of the court's inquiry into whether the presumption is rebutted in a case in which

an exception is claimed under Article 13(b), judicial communications can be helpful, though never determinative, as some judges may be reluctant to acknowledge the limitations of the justice system in their own jurisdictions. It is a bit puzzling that Perkins, J., who writes in his decision that he has more than a passing comprehension of Spanish, did not try to communicate with the *Hague Convention* liaison judge in Peru. It was not required, but an attempt at communication may have demonstrated concern for the administration of justice in another signatory state, and might also have allowed the court to more fully consider whether the Peruvian system would allow for adequate protection of the child and the mother. This is a particular concern since Perkins J., after his review of the litigation documents from Peru, made somewhat disparaging remarks about the justice system in that country.

The *Convention* is periodically reviewed by a Special Commission, with representatives of signatory states meeting at the Permanent Bureau in the Hague to assessing how the implementation of the *Convention* could be improved. The most recent Special Commission meeting was held in 2012. One of the agenda topics was how to manage direct communications between judges in contracting states. Previous Special Commissions endorsed and encouraged judges communicating with one another, but there is no formal protocol at present. Some states have expressed a desire to have a "legal basis" for cross-border communications included in the Convention itself. There are many issues that arise if judges in different jurisdictions speak to one another, and a detailed protocol including allowable topics for discussion in such conversations, and also including how counsel can be involved, or can obtain a transcript, have not yet been fleshed out.[102]

6. THE RIGHTS OF CHILDREN & REFUGEE APPLICATIONS

While *Hague* proceedings are intended to be summary and not to directly address "best interests," children are nevertheless profoundly affected by them, and courts in a number of countries are struggling with issues about how to respect the rights of children in *Hague Convention* proceedings. Article 12 of the *United Nations Convention on the Rights of the Child*, as well as instruments like Canada's *Charter of Rights* may, in some cases, give children the right "to be heard" in these proceedings.

The complex balancing of the wishes and rights of children against the obligations imposed by the *Hague Convention* is most apparent in cases where a child has made a refugee application, as in the 2011 Ontario Court of Appeal decision in *I. (A.M.R.) v. R. (K.E.)*.[103] The girl in that case was born in Mexico and after her parents separated she continued to reside there with her mother there pursuant to a Mexican court order. In 2009, at the age of 12, she came to Ontario to visit her father, who had access rights and lived in Ontario at the time. She disclosed to the father that the mother was abusive. The child did not return to Mexico but remained in Ontario with the father and an aunt. In 2010, the child made an application to be granted refugee status in Canada due to the abuse by her mother and the failure of the Mexican authorities to adequately protect her. The father, however, was denied refugee status and moved to Norway, while the child remained in Ontario with her aunt. After the child had been living in Ontario for about 18 months, the mother brought a *Hague Convention* application in Ontario for the child's return to Mexico. Neither the father nor the aunt, who had *de facto* custody, was served with notice of the application, although the father was the named respondent. The hearing proceeded on an uncontested basis; none of the father, the aunt or the child participated. The application judge held that the child was being wrongfully retained in Ontario and ordered her immediate return to Mexico, which was effected through the involvement of the police.

Despite the child's return to Mexico, the father appealed, with the Ontario Children's Lawyer representing the child on the appeal. The Ontario Court of Appeal held that the trial judge had erred in ordering the child's return to Mexico without considering the child's refugee status or giving the child an opportunity to participate in the proceedings. The Court of Appeal held that, properly interpreted, the *Hague Convention* is consistent with Canada's obligations under international law to protect those with refugee claims (known as the non-refoulement obligation under the *Refugee Convention*). Thus, if a child has been recognized as a refugee under Canada's refugee law, as happened in this case, a rebuttable presumption arises that there is a risk of persecution and harm on return of the child to his or her country of habitual residence. In determining whether to grant an order of return under the *Hague Convention*, a judge must assess the extent of any persisting risk of persecution to be faced by the child. In this situation, the *Hague Convention* hearing must be consistent with the child's right to treatment in accordance with the *Charter of Rights* s. 7 "principles of fundamental justice," as there was a threat to her "security of the person" if returned to a country where she might face persecution.

Given the child's age, the nature of her objection, her established status as a under the *Refugee Convention*, the length of time that she had been in Ontario, and the absence of any meaningful current information regarding her actual circumstances in Ontario at the date of the hearing, the Court of Appeal held that her views objecting to return to her mother's care in Mexico were a proper consideration and the *Charter* required that she be given notice and an opportunity to participate. While the

Court of Appeal order had no effect in Mexico, by the time of the appellate court ruling, the youth had been able to leave Mexico on her own and get to Canada. There was no further hearing and she continued to reside in Canada.[104]

While the facts of *I.(A.M.R.)* were somewhat unusual, it is becoming increasingly common to have concurrent refugee and *Hague* proceedings. Significantly, it has been held that the fact that a refugee claim is underway does not require that a *Hague Convention* application should be delayed or a return order not made.[105] The *Hague Convention* court must, in any event make its own determination of whether Article 13 is satisfied. The refugee process is a separate proceeding with different parties; in particular, the left-behind parent is not involved in the refugee process.

(a) Children Involved in Hague Applications

The recent decisions of the Ontario Court of Appeal in *I. (A.M.R.) v. R. (K.E.)*,[106] the Alberta Court of Appeal in *S. (J.) v. M. (R.)*[107] and the United Kingdom Supreme Court in *L.C. (Children) (International Abduction: Child's Objections to Return), Re*[108] all raise the issue of how and when children should be involved in *Hague Convention* applications. In each of these cases children, aged 9 to 13 years, were made parties or had counsel appointed to represent their interests in the proceedings.

In the 2006 English House of Lords decision *D (a child), Re* Lady Hale suggested that:

> children should be heard far more frequently in . . . *Convention* cases than has been the practice hitherto . . . whenever it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which the adult parties are not putting forward, then the child should be separately represented.[109]

She also recognized that in most *Hague* cases "the intrusion, the expense and the delay" that would result from appointment of counsel for a child should cause a court to not make the child a party or appoint counsel for the child, and it is sufficient for the child's perspectives to be presented to the court through the evidence of an independent mental health professional who has interviewed the child. However, there are cases where "child-centric" issues arise, such as an older child's objections to return or the threat of a possible grave risk to a mature child. In such cases a child's perspective may be sufficiently important that there should be representation for the child.[110]

In deciding whether to appoint counsel or make a child a party, the court should take into account concerns about not wanting to exacerbate hostility between a child and one parent, usually the left-behind parent. However, the Ontario Court of Appeal has held that in cases where a child's "liberty or security of the person" may be affected by a return, for example because there is a claim of potential harm due to alleged violence or abuse, section 7 of Canadian *Charter of Rights* requires that a child must be given notice of the proceedings and an opportunity to participate through counsel.[111] The Court of Appeal held that concerns about protection for a child's "liberty and security of the person" should "predominate," which requires affording the child an opportunity to participate and have his or her views heard.
Some of the factors to be considered in deciding whether to grant party status or legal representation to a child include:[112]

- Where the child is older and there is a reasonable prospect that the child has the capacity to instruct counsel and have an independent position;

- Where the child's position may not be adequately represented by the adult parties, for example because of their lack of legal representation;

- Where an expert or therapist involved with the child recommends such involvement;

- Where the child has expressed concerns that return might affect his or her life, liberty or security of the person.

A court making an order appointing counsel may provide some direction or restrictions on the role of counsel for the child. In the absence of such restrictions, counsel for the child should take account of such factors as the age, the capacity of the child to instruct counsel, the views of the child and any provincial law society guidelines about the role that counsel is to play. Counsel should normally be taking instructions from a child who is expressing clear and consistent views.[113] Counsel should ensure that the child understands the limited scope of *Hague* proceedings. A grant of party status to a child usually does not mean that the child will attend court to testify. Some of the steps that counsel for a child in a *Hague* case may take include:

- Unless inappropriate, facilitating contact and visits with the left-behind parent;

- Retaining an independent mental health professional to interview the child and testify in court about the child's views, perspectives, concerns and capacities;
- Adducing other evidence and cross-examining witnesses to advance the child's position;
- Discussing with the child and court whether the child should meet the judge;[114] and
- Making submissions on behalf of the child.

7. PROCEDURAL ISSUES IN CONVENTION PROCEEDING IN CANADA

(a) Which Court?

Applications are generally to be made in the court where family proceedings are conducted in the place where the child is living at the time of the application. Where there is a Unified Family Court, applications are to be made to that court. In places where there are two levels of court with family jurisdiction, such as many locales in Ontario, *Convention* applications may be made to either the Superior Court or the provincial court.[115] Commonly in these two level locales, applications are made to the provincial court as applicants may expect that proceedings will generally be resolved more quickly and with less expense in this court.

(b) Manner of Hearing — Affidavits Only or Viva Voce Evidence?

The stated objective of the *Convention* is to ensure the "*prompt* return" of children who have been wrongfully removed (Article 1); and the *Convention* makes it mandatory for its signatories to employ "the most expeditious procedures available" (Articles 2 and 11). Article 11 provides that if the proceedings take longer than six weeks, the Applicant, or the Central Authority in the requesting state can ask the Central Authority of the requested state to provide "reasons" why the matter has not been resolved. This provision demonstrates the *Convention*'s important objective of summary resolution, but the provision is not worded in a mandatory fashion. In many European countries, *Convention* applications are expedited and actually decided within 4 to 8 weeks;[116] Canada does not have statistics on time taken to resolve applications, but based on the reported case law, Canadian courts generally take more than six weeks from the filing of the application to resolve *Convention* cases.

In most Canadian jurisdictions, judges can allow hearings for the return of children pursuant to the *Convention*, with oral evidence and cross-examination,[117] but the most common method of resolution is by with affidavit evidence only.[118] In most jurisdictions, *Convention* applications are heard on affidavit evidence, with local rules varying about how cross-examination is effected, e.g. outside the hearing like in Ontario or in the hearing like in Nova Scotia. In all Canadian jurisdictions there is the possibility of a hearing with oral testimony before a judge; if there are important credibility issues that can only be resolved through oral evidence, there is likely to be a hearing before a judge.

The Ontario Court of Appeal has stated that oral evidence is only to be heard in *Convention* matters in "exceptional cases." In *Cannock v. Fleguel*, Juriansz, J.A., writing for the Court commented on the process:

> The question of when a judge should hear oral evidence when deciding an application under the Hague Convention has not been the subject of extensive judicial discussion in Canada. Typical is the statement of Little J. at para. 25 of In *Mahler v. Mahler* (1999), 3 R.F.L. (5th) 428 that "The Hague Convention procedures are summary ones and except in the most unusual of circumstances are based on affidavit evidence."[119]

The *Convention* encourages summary resolution, based on affidavit and documentary evidence alone, though a court may allow the calling of oral evidence or cross-examination on affidavits filed. A 2013 Ontario case, *A.H. v C.F.S.H.*, illustrates how a court may deal with claims of "grave risk" under Article 13(b) of the *Convention* without hearing oral evidence.[120] The parties met in Australia, where the father, an Australian citizen, lived. They married and had a child in Canada, and when the child was one year old, they moved to Australia. Within three months of their arrival in Australia, the mother and child moved back to Canada where the mother's family resided. After a very brief attempt at reconciliation in Canada, the father brought an application pursuant to the *Convention* for the child's return to Australia. Two of the main issues in the case were whether the child had established a habitual residence in Australia and whether the father had acquiesced to the child's return to Canada. Having resolved these issues in favour of the applicant, the judge considered the mother's allegations that she had "suffered severe abuse at the hands of the father throughout this short marriage, and that the abusive behaviour was the

catalyst for the breakdown of the marriage." As a result, the mother claimed that she feared for her own safety and the safety of the child. The father denied the allegations of abuse, and the court had to address the dispute over the facts.
Justice Kruzick noted "matters commenced under the *Hague Convention* require a quick decision of the court so that the custody and access issues can be addressed with some rapidity. This is particularly important here given the age of this young child." The case was resolved based on affidavit and documentary evidence filed, without any oral evidence or cross-examination. The trial judge discussed the test for invoking Article 13(b) and quoted from the Ontario Court of Appeal decision in *Wentzell-Ellis v. Ellis*:[121]

> Article 13(b) creates an exception to the general rule that a child wrongfully removed or retained in a contracting state should be returned to his country of habitual residence. The provision sets a high threshold of a "grave risk" of physical or psychological harm or otherwise placing the child in an "intolerable situation".
>
> This interpretation is only reinforced when examining the text in its context and in light of the treaty's object and purpose. As stated by Chamberland J.A. in *F. (R.) v. G. (M.)*, [2002] J.Q. 3568 (C.A.), at para. 30:
>
> > The Hague Convention is a very efficient tool conceived by the international community to dissuade parents from illegally removing their children from one country to another. However, it is also . . . a fragile tool and any interpretation short of a rigorous one of the few exceptions inserted in the Convention would rapidly compromise its efficacy.

Justice Kruzick observed that these were "very recent allegations [and] there was no indication of harm to either the mother or the child before they left for Australia or once they were there that was of threatening nature." There was no evidence that the mother had contacted the police or child protection authorities to seek assistance or protection either in Australia or while the couple resided in Canada. The judge concluded:

> In the end, the words "grave risk of harm" mean something of a severe and threatening nature that will impact on the well-being and security of the child. I am not able to come to that conclusion here. In assessing what is in the best interests of the child, I must presume that the court with jurisdiction to deal with that determination will do so appropriately in light of the circumstances of the parties.[122]

The Ontario Court of Appeal expedited the appeal process and rendered oral judgement, affirming the trial judge's decision, observing that it was appropriate for the judge to weigh the credibility and seriousness of the domestic violence allegations without hearing oral evidence. The Court of Appeal stated:[123]

> An appeal to this court in a Hague Convention case is not a rehearing or a trial *de novo* review of the evidence, and the application judge's findings are entitled to considerable deference. They will not be interfered with — notwithstanding the hearing is based on affidavit, not *viva voce*, evidence — unless they are unreasonable in the sense that they amount to "palpable and overriding error" or "manifest error" or "clear error."

By contrast to the summary process in *A.H.*, in *Husid v. Daviau*[124] it took just over year for the matter to come to trial, and a 7 day hearing was held. There was then an appeal; it took just over two years between the time of the removal of the child, and the rendering of a final appeal decision.[125] There were important credibility issues in this case that necessitated an oral hearing. Despite the need to resolve some early procedural matters and resolve credibility issues, the length of time between the initial application and the hearing and appeal is cause for concern.

The manner of hearing is an important issue that counsel and the judiciary should be considering at the outset of a *Hague* application. Children grow up quickly. The longer a child remains in a jurisdiction, the more relationships and connections the child will develop, and the harder it will be on the child to return. In order to meet the expectations for expeditious resolution required by the *Convention*, these applications should ordinarily be resolved based only on affidavit and documentary evidence. There will, however, be cases where the respondent raises significant, material issues that require oral evidence and cross-examination before the judge to allow a full assessment of credibility.

(c) Costs in Convention Proceedings

The limited resources of the litigants and a desire to avoid heightening tensions or lengthening proceedings often result in no request for costs in *Hague* cases. However, it is clear that the court has the authority to award costs to the successful party in a *Hague* application. Article 26 of the *Convention* also allows the court ordering the return of a child to order that the person who wrongfully removed or retained a child to pay "necessary expenses incurred" by an applicant in obtaining the return of a

child, including travel and legal expenses. Further, provincial cost rules are generally applicable to *Convention* proceedings.

The most common costs claim in *Convention* proceedings is an applicant seeking costs after an order for return is made. The *Convention* allows that all expenses incurred to secure the children's return may be shifted to the abducting parent. Understandably, judges are often sympathetic towards a request for costs for a successful left-behind parent, who is usually put to considerable expense to have a child wrongfully removed returned to the jurisdiction of habitual residence.

An example of a case where an award of costs was made to an applicant parent is the 2013 Ontario case of *Solem v. Solem*. The parties and their four children had always lived in Norway; after separation they resided primarily with their mother, but visited their father who had joint legal custody. The mother then took the children to Canada, altering some documents that the father had signed to allow them to travel with her in order to make it appear that he agreed to their moving permanently from Norway. The father brought a *Convention* application for their return in Ontario. Justice Turnbull ordered their return, albeit with an undertaking from the father that they were to remain in the continued care of the mother until matters could be resolved by a court in Norway; the judge found that there was a wrongful removal, and dismissed allegations of "grave risk" of harm, noting that during the period of separation in Norway, the mother had made no complaints of abuse and had allowed regular visits with the father.[126] The order for return was premised on the father's undertaking to pay all travel expenses for the return of the mother and children. After their return, the Ontario judge received submissions about costs, and awarded "substantial indemnity costs" to the father.[127] The judge observed that the litigation became necessary because of the "self-help" approach chosen by the mother to unilaterally remove the children from Norway. Justice Turnbull concluded that her behavior "unreasonable" and noted that the objectives of the *Convention* would be defeated if the father were required to fund the process of locating the abducted children and obtaining their return.

The total costs awarded to the father included reimbursement for much of the travel that the father undertook to attend the Ontario proceedings, and roughly 80% of fees of his Norwegian lawyer and Ontario counsel. The total amount awarded for Ontario costs and disbursements was over $50,000 plus about $3,500 for travel costs for the father and $8,000 for counsel in Norway. The court rejected an argument of maternal impecuniosity, noting that the father was a school janitor, who had to use his share of the net proceeds of the sale of the matrimonial home to pay for the application. It was not, however, clear how the costs award would be enforced against the mother in Norway.

Although there are practical concerns about how to enforce a costs order against an unsuccessful applicant, unless that person has assets in Canada, successful respondents may also be awarded costs. This may be especially appropriate if the respondent has established a defense under Article 13 that removal was due to concerns about domestic violence.[128] This may have practical significance if the respondent is still involved in a dispute or litigation about assets in the jurisdiction where the parties cohabited.

8. CONCLUSION: IMPROVING THE HAGUE PROCESS

The *Hague Convention* is a unique and complex legal instrument that is intended to resolve issues arising from the removal of children from their home jurisdictions in an efficient and fair way, in order to allow the courts with the closest connection to the children to make an appropriate decision based on the best interests of the children involved. Its purpose is straightforward, but its implementation is often complex. While the application of the *Convention* is challenging for practitioners and judges who have no experience with it, it is not by any means impossible for a Canadian family law judge or practitioner to properly use the *Convention*. As the number of *Hague* applications is increasing, there is a need for on-going education for judges, lawyers and court administrators about the *Convention*.

There are concerns in many countries about the time that it takes to resolve *Hague* cases.[129] Although there are no reliable national statistics on how long it takes to resolve these applications in Canada, it is apparent that there are often significant delays in resolving these cases, and judges need to give expedite their resolution, for example, holding trials with oral evidence only where necessary.

There are also significant concerns about access to the justice system and legal aid in *Hague* cases. In some jurisdictions, the Central Authority provides legal representation for left-behind parents, who often great financial burdens in locating and securing the return of their children. Except in New Brunswick, Central Authorities in Canada do not carry out this role, often resulting in the interests of parents and children being defeated. There is also a need for timely involvement of independent mental health professionals in these cases, to interview children and ensure that their views and perspectives are understood by the court; too often this does not occur in cases where it would be very helpful.

As in other areas of family law, there is significant scope for resolution of *Hague* cases by mediation. Although cases involving serious allegations of domestic violence may not be appropriate for mediation, there is significant scope for the use of mediation, undertakings, conditions for return and mirror orders that may allow for safe return of the taking parent and children without requiring an expensive *Hague Convention* process.[130] Improved international co-operation and communication through greater use of the International Hague Network of Judges can help to resolve cases more expeditiously, whether by mediation or litigation.

The Hague Conference Secretariat has done a good job of making documents easily available on the web. However, there are inevitably some differences of judicial opinion and legal practice about the interpretation and application of the *Convention*. The Hague Conference Secretariat addresses the implementation of the *Convention* by contracting states on a regular basis and by publishing *Guides to Good Practice* and other documents on its website. The issue of resolution of cases involving domestic violence allegations and Article 13(b) is controversial at present, and an international Working Group is developing a *Guide to Good Practice* for these cases; it is to be hoped that the publication of this *Guide* will facilitate resolution of these cases, which are increasingly frequent and contentious. Another contentious set of issues that need to be addressed relate to the role and rights of children in *Hague* proceedings.

> If AMW is also returning then the terms shall include no less than AES providing: i) separate accommodation conducive to child rearing and no less comparable to his own in Rancho Cucamonga in the general vicinity of the school(s) the parties selected for AMW and A; ii) all costs thereof including internet access; iii) all costs of AMW's vehicular transportation; iv) health insurance for AMW; and v) on an interim refundable basis, child support in US dollars at the appropriate amount in the Canadian Federal Child Support Guidelines table as if A was a resident of Alberta. These terms are to apply until the earlier of agreement of the parties or an order of the California Court. Return travel to California for both AMW and A shall be paid by whomever was originally going to be paying for AMW and A's return at the end of the January 24, 2012, trip.

Footnotes

* Professor, Faculty of Law, Queen's University. This is a substantially revised version of papers presented at the Family Law Summit in Toronto in May 2013 and the Ontario Court of Justice Education Program in Toronto in January 2014. The authors wish to thank Queen's J.D. Candidates students Craig Zeeh (2015) and Andrew Bala (2017) for their editorial assistance.

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1 "International Parental Child Abductions Rise with Global Migration", *Toronto Star*, Feb 22, 2013. Unfortunately, unlike in many other countries, there are no national statistics in Canada on *Hague* applications.

2 There is a growing administrative practice in some jurisdictions in Canada to assign *Hague* cases to a limited group of judges to allow them to have sufficient education and familiarity with the issues and deal with the cases more effectively. In some large cities there are a small number of lawyers who have significant experience with these cases and get referrals from other family lawyers. It is, however, still common in Canada and elsewhere for experienced family lawyers and judges to only become involved in such one case during a long career.

3 For a discussion of the historical concerns about abduction by fathers, see Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention On International Child Abduction* (London: Oxford University Press, 1999) p.8, citing studies from the 1970s and 1980s indicating that more than 70% of parental abductors were male For more recent statistics, see e.g. Nigel V. Lowe, *A Statistical Analysis Of Applications Made In 2008 Under The Hague Convention* (Hague Conference on Private International Law, 2011), reporting that in 69% of reported *Hague Convention* cases, mothers were the taking parent.

4 There are a number of comprehensive international texts on the *Convention*: see Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention On International Child Abduction* (London: Oxford University Press, 1999),; some of the recent international texts have a critical perspective: see e.g. Rhona Schuz, *The Hague Convention: A Critical Analysis* (Oxford UK: Hart Publishing, 2013) and Thalia Kruger, *International Child Abduction: The Inadequacies of the Law* (Portland OR: Oxford, 2011). It is our intention here to provide a Canadian perspective on the *Convention*.

5 See Canada, *International Child Abduction: A Guidebook for Left-Behind Parents*. Online, last accessed Jan 21, 2014 http://travel.gc.ca/travelling/publications/international-child-abductions#directory. For a discussion of some of the strategies that counsel can use to prevent international child abduction, see Victoria Starr, "Preventing Parental Child Abduction — The Role of the Lawyer in Managing the Risk" (2013) 32 C.F.L.Q. 137.

6 For text of the *Convention* and related material, see HCCH Overview at http://www.hcch.net/index_en.php?act=text.display&tid=26.

7 See Alberta: *International Child Abduction Act*, RSA 2000, c. I-4; British Columbia: *Family Law Act* S.B.C. 2011, c. 25 s. 80; Manitoba: *The Child Custody Enforcement Act*, CCSM c C360, s. 17; Newfoundland and Labrador: *Children's Law Act*, RSNL 1990, c C-13; New Brunswick: *International Child Abduction Act*, RSNB 2011, c 175; Northwest Territories & Nunavut: *International Child Abduction Act*, RSNWT (Nu) 1988, c I-5 Nova Scotia: *Child Abduction Act*. R.S.N.S., c. 67, s. 1; Ontario, *Children's Law Reform Act*, R.S.O. 1990, c. C12, s. 46; Prince Edward Island, *Intercountry Adoption (Hague Convention) Act*,

R.S.P.E.I. 1988, c I-4.1; Quebec: *An Act Respecting the Civil Aspects of International and Interprovincial child abduction*, CQLR c A-23.01; Saskatchewan: *The International Child Abduction Act, 1996*, SS 1996, c I-10.11; Yukon: *International Child Abduction (Hague Convention) Act*, SY 2008, c 5.

8 http://www.incadat.com.

9 The countries that have adopted the *Convention* are listed at: http://www.hcch.net/index_en.php?act=conventions.publications&dtid=42&cid=24

10 In cases of wrongful removal of a child from Canada, the Vulnerable Children's Consular Unit of the Consular Services of the Department of Foreign Affairs, Trade and Development Canada.

11 See *Shortridge-Tsuchiya v. Tsuchiya*, 2010 CarswellBC 276, [2010] B.C.J. No. 217 (B.C. C.A.); leave to appeal refused 2010 CarswellBC 1797, 2010 CarswellBC 1798 (S.C.C.). Canadian courts give some recognition to Hague principles in deciding whether to recognize and enforce foreign custody orders or rights. For example, Ontario's *Children's Law Reform Act* ss. 22 & 23, and similar legislation in other provinces, generally requires Canadian courts to grant a request by a left-behind parent to return children taken to Canada by one parent to the jurisdiction of "habitual residence," even if a non-Hague country; however, the exceptions to return are somewhat broader than in the *Hague Convention*, and there is no role for Central Authorities to assist in return. The legal and practical problems of enforcement of Canadian custody orders and rights in countries that have not adopted the *Hague Convention*, like India, are considerably greater than in Hague countries. Indeed, in many non-Hague countries, enforcement of Canadian orders and custody rights may be effectively impossible. See Ramby de Mello, "Getting Children Back from Non-Hague Convention Countries (Sept. 2013), 6:1 *Family Law News Newsletter of the International Bar Association Legal Practice Division* 34.

12 Article 19 states that a decision under the Convention concerning the return of a child is not to be "taken as a determination on the merits of any custody issue."

13 See Articles 6 and 7 of the *Convention*. Both the *Divorce Act* s. 20(2) and provincial legislation like the Ontario *Children's Law Reform Act* s.41 give Ontario courts the jurisdiction to enforce custody orders made within Canada. However, unlike in *Convention* cases, there is no scope for involvement of a Central Authority, and at least in terms of civil enforcement, parents must enforce these orders on their own. It is beyond the scope of this article to discuss the possibility of police responses to child abduction; see *Criminal Code* ss. 281-283. For a discussion of responses within Canada to child abduction within Canada where the Hague Convention does not apply, see Joan A. MacPhail, "Responses to Inter-jurisdictional Custody and Access Breaches" (2004) 23 Can. Fam. L.Q. 123. In general, Canadian federal and provincial laws operate within Canada to require custody and access issues to be dealt with in the place of habitual residence of children and to deter parents from forum shopping within the country.

14 *Katsigiannis v. Kottick-Katsigiannis*, 2001 CarswellOnt 2909, [2001] O.J. No. 1598 (Ont. C.A.).

15 See, for example, *Wilson v. Huntley*, 2005 CarswellOnt 1606, [2005] O.J. No. 1664 (Ont. S.C.J.) at para. 69.

16 See *Thomson v. Thomson*, 1994 CarswellMan 91, 1994 CarswellMan 382, [1994] 3 S.C.R. 551, 6 R.F.L. (4th) 290 (S.C.C.).

17 Article 29.

18 An exception is New Brunswick. The Central Authority in that province will commence legal proceedings at the request of the authority from another contracting state: see *Savard v. Fern*, 2012 CarswellNB 261, [2012] N.B.J. No. 153 (N.B. Q.B.).

19 *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 16.

20 1979 CarswellOnt 299, [1979] O.J. No. 4343 (Ont. C.A.) at para. 15.

21 1994 CarswellMan 91, 1994 CarswellMan 382, [1994] 3 S.C.R. 551, 6 R.F.L. (4th) 290 (S.C.C.)

22 1994 CarswellMan 91, 1994 CarswellMan 382, [1994] 3 S.C.R. 551, 6 R.F.L. (4th) 290 (S.C.C.) at para. 46.

23 2008 CarswellOnt 5407, [2008] O.J. No. 3586 (Ont. S.C.J.).

24 Above at para. 57.

25 2007 CarswellOnt 2546, [2007] O.J. No. 1587 (Ont. C.J.).

26 See *Jones v. Yamchuk*, 2005 CarswellSask 793, [2005] S.J. No. 743 (Sask. Q.B.) for a good description of chasing orders and their effects on Convention litigation.

27 1994 CarswellMan 91, 1994 CarswellMan 382, [1994] S.C.J. No. 6 (S.C.C.).

28 A parent who has taken the child from the jurisdiction of habitual residence will sometimes "forum shop", and may even return to the courts in the place of habitual residence and try either to fight the chasing order, or obtain an order in that court granting custody. See for example *Hu v. Hu*, 2010 CarswellBC 3266, [2010] B.C.J. No. 2382 (B.C. C.A.). The mother left Washington State (the place of habitual residence) and went with the children to British Columbia; she then obtained an *ex parte* order in Washington granting her custody there, and then took the children back to British Columbia. The father brought a *Hague* application in B.C. to have the children returned to Washington; the B.C. Court of Appeal held that by returning to Washington State to obtain the custody order, the mother had conceded that this was the children's habitual residence. However, because the Washington court had granted her custody, and had not restricted her ability to move with the children, the court held that the children were therefore not "wrongfully retained" in British Columbia.

29 1996 CarswellQue 370, 1996 CarswellQue 370F, [1996] S.C.J. No. 53 (S.C.C.). In this case the Supreme Court held that the left-behind mother had no *Convention* rights, but nevertheless upheld an award of custody to her and return of the child to her jurisdiction on the basis that this was in the child's best interests.

30 Chasing orders may, for example, be helpful if there is a removal to the United Kingdom and some European countries: see e.g. Rhona Schuz, *The Hague Convention: A Critical Analysis* (Oxford UK: Hart Publishing, 2013) and *S. (A Minor) (Custody:*

Habitual Residence), Re (1997), [1998] A.C. 750 (U.K. H.L.).

31 See, for example, *Richardson v. Richardson*, [1880] O.J. No. 301, 8 P.R. 274 (Ontario Practice Court, Chancery Chambers), in which the court discusses the phrase in connection with "alimony"; and *Hunter v. Mountjoy*, 1858 CarswellOnt 23, [1858] O.J. No. 346 (U.C. Ch.), in which the court refused to discharge a "writ of *ne exeat*" against a fraudster.

32 1994 CarswellMan 91, 1994 CarswellMan 382, [1994] S.C.J. No. 6 (S.C.C.).

33 1994 CarswellMan 91, 1994 CarswellMan 382, [1994] S.C.J. No. 6 (S.C.C.) at para. 67.

34 See *Johnson v. Jessel*, 2012 CarswellBC 3042, [2012] B.C.J. No. 2036 (B.C. C.A.); leave to appeal refused 2013 CarswellBC 427, 2013 CarswellBC 428 (S.C.C.); *Loucidis v. Loukas*, 2002 CarswellOnt 2905, [2002] O.J. No. 3404 (Ont. S.C.J.). See also *Lombardi v. Mehnert*, 2008 CarswellOnt 2075, [2008] O.J. No. 1413 (Ont. C.J.); just because an order does not contain a non-removal clause, it will not always follow that the custodial parent will be held to have the right to move with the child. In this case, McSorley, J. held that even though the mother had an interim order for custody, and even though the interim order did not contain a non-removal clause, because the order was interim only, the court in the state of New York, which was the child's habitual residence, continued to have an interim institutional "right of custody".

35 Martha Bailey, "*Abbott v. Abbott*: Do *Ne Exeat* Provisions Create Rights of Custody?" (2010) 29 CFLQ 171

36 [2006] UKHL 51 (U.K. H.L.).

37 Above, paras. 37 & 38.

38 130 S.Ct. 1983 (2010).

39 *Ibid.* 130 S.Ct. 1983 (2010) at p. 1991.

40 2004 CarswellOnt 3203, [2004] O.J. No. 3256 (Ont. C.A.); leave to appeal refused 2005 CarswellOnt 3135, 2005 CarswellOnt 3136 (S.C.C.). *Korutowska-Wooff v. Wooff* has been followed elsewhere in Canada; see e.g. *H. (A.) v. H. (F.S.)*, 2013 CarswellOnt 2510, [2013] O.J. No. 1011 (Ont. S.C.J.); *Mindermann v. Mandall*, 2010 CarswellOnt 3413, [2010] O.J. No. 2122 (Ont. C.J.); *Wentzell-Ellis v. Ellis*, 2010 CarswellOnt 2981, [2010] O.J. No. 1987 (Ont. C.A.); additional reasons 2010 CarswellOnt 4016 (Ont. C.A.); *S. (A.E.) v. W. (A.M.)*, 2012 CarswellAlta 2357, [2012] A.J. No. 1404 (Alta. Q.B.); affirmed 2013 CarswellAlta 427 (Alta. C.A.); *P. (D.L.) v. A. (S.)*, 2010 CarswellMan 588, [2010] M.J. No. 304 (Man. Q.B.).

41 2007 CarswellOnt 3216, [2007] O.J. No. 2035 (Ont. C.A.)

42 2005 CarswellOnt 1606, [2005] O.J. No. 1664 (Ont. S.C.J.)

43 http://www.incadat.com/index.cfm?act=analysis.show&sl=3&lng=1

44 [2014] UKSC 1 (U.K. S.C.). See also *A. v. A. (Children) (Habitual Residence)*, [2013] UKSC 60 (U.K. S.C.), and *KL (A Child), Re*, [2013] UKSC 75 (U.K. S.C.).

45 *Juma v. Juma*, 2012 CarswellOnt 9014, [2012] O.J. No. 3305 (Ont. S.C.J.), not set out in the judgment, but this was the manner of proof of Florida law in that case.

46 *S. (M.C.) v. L. (H.V.)*, 2011 CarswellSask 83, [2011] S.J. No. 83 (Sask. Q.B.) at para. 12, ; additional reasons 2011 CarswellSask 107 (Sask. Q.B.); additional reasons 2011 CarswellSask 108 (Sask. Q.B.).

47 *Espiritu v. Bielza*, 2007 CarswellOnt 2546, [2007] O.J. No. 1587 (Ont. C.J.).

48 2012 CarswellBC 2065, [2012] B.C.J. No. 1476 (B.C. S.C.); affirmed 2012 CarswellBC 3042 (B.C. C.A.); leave to appeal refused 2013 CarswellBC 427, 2013 CarswellBC 428 (S.C.C.). Canadian courts also make requests for opinions from courts of states from which children have been removed to Canada: see *H. (J.M.) v. S. (A.)*, 2010 CarswellNB 352, [2010] N.B.J. No. 228 (N.B. Q.B.); additional reasons 2010 CarswellNB 416 (N.B. Q.B.).

49 2012 CarswellBC 3042, [2012] B.C.J. No. 2036 (B.C. C.A.); leave to appeal refused 2013 CarswellBC 427, 2013 CarswellBC 428 (S.C.C.).

50 See *Stone v. Stone*, 2010 CarswellOnt 3825, [2010] O.J. No. 2431 (Ont. S.C.J.); *Caruso v. Caruso*, 2006 CarswellOnt 8544, [2006] O.J. No. 5311 (Ont. S.C.J.); *Parker v. Parker*, 2008 CarswellOnt 1701, [2008] O.J. No. 1188 (Ont. S.C.J.); additional reasons 2008 CarswellOnt 2254 (Ont. S.C.J.).

51 *Wedig v. Gaukel*, 2007 CarswellOnt 2479, [2007] O.J. No. 1547 (Ont. S.C.J.); additional reasons 2007 CarswellOnt 2580 (Ont. S.C.J.); affirmed 2007 CarswellOnt 4299 (Ont. C.A.); *Kirby v. Thuns*, 2008 CarswellOnt 5407, [2008] O.J. No. 3586 (Ont. S.C.J.).

52 2011 CarswellQue 7220, [2011] Q.J. No. 8824 (C.S. Que.).

53 2012 CarswellNB 261, [2012] N.B.J. No. 153 (N.B. Q.B.). See also *Solem v. Solem*, 2013 CarswellOnt 1699, [2013] O.J. No. 723 (Ont. S.C.J.); additional reasons 2013 CarswellOnt 8639 (Ont. S.C.J.); additional reasons 2013 CarswellOnt 16977 (Ont. S.C.J.).

54 2012 CarswellAlta 2357, [2012] A.J. No. 1404 (Alta. Q.B.); affirmed 2013 CarswellAlta 427 (Alta. C.A.).

55 2010 CarswellBC 510, [2010] B.C.J. No. 383 (B.C. C.A.).

56 2008 CarswellBC 2097, [2008] B.C.J. No. 1893 (B.C. S.C.) at para. 99, ; affirmed 2010 CarswellBC 510 (B.C. C.A.).

57 2008 CarswellBC 2097, [2008] B.C.J. No. 1893 (B.C. S.C.) at para. 66, ; affirmed 2010 CarswellBC 510 (B.C. C.A.). Emphasis in original.

58 2010 CarswellQue 9711, [2010] Q.J. No. 9286 (C.S. Que.); affirmed 2011 CarswellQue 4200 (C.A. Que.); leave to appeal refused 2011 CarswellQue 13709, 2011 CarswellQue 13710 (S.C.C.).

59 2011 QCCA 719, 2011 CarswellQue 3916 (C.A. Que.); leave to appeal refused 2011 CarswellQue 11240, 2011 CarswellQue 11241 (S.C.C.).

60 2001 CarswellOnt 2909, [2001] O.J. No. 1598 (Ont. C.A.) at para. 46-47.

61 2008 CarswellOnt 121, [2008] O.J. No. 99 (Ont. C.A.); additional reasons 2008 CarswellOnt 278 (Ont. C.A.).

62 This approach accords with the international jurisprudence. In *H. (Minors), Re* (1996), [1998] A.C. 72 (Eng. H.L.), the House of Lords held that courts should not automatically consider attempts by the left-behind parent to reconcile, or to work out a voluntary return of the children, which may have delayed the Convention application, to be indicators of acquiescence or consent.

63 See *S. (J.M.) v. L. (G.F.S.)*, 2011 CarswellAlta 2358, [2011] A.J. No. 1367 (Alta. Q.B.)

64 There is a significant critical literature which argues that the *Hague Convention* may serve to endanger abused women and their children: see e.g. Taryn Lindhorst & Jeffrey Edelson, *Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention* (Boston, MA: Northeastern University Press, 2012); and Carol Bruch, "The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases" (2004) 38 Fam. L. Q. 529; and Merle Weiner, "The Potential and Challenges of Transnational Litigation for Feminists Concerned about Domestic Violence Here and Abroad" (2003) 11 Am U J Gender, Soc Pol & Law 749.

65 1994 CarswellMan 91, 1994 CarswellMan 382, [1994] 3 S.C.R. 551 (S.C.C.).

66 *Callicutt v. Callicutt*, 2014 MBQB 144, 2014 CarswellMan 339 (Man. Q.B.) at para. 93.

67 1999 CarswellOnt 848, [1999] O.J. No. 911 (Ont. C.A.) at para. 33.

68 2010 CarswellOnt 5562, [2010] O.J. No. 3259 (Ont. C.J.); additional reasons 2011 CarswellOnt 14382 (Ont. C.J.).

69 The Permanent Bureau has a helpful document that reviews literature and case law from a number of countries: *Domestic and Family Violence and the Article 13(b) "Grave Risk" Exception in the Operation of the Hague Convention on Child Abduction: A Reflection Paper* (2011) http://www.hcch.net/upload/wop/abduct2011pd09e.pdf This work was cited by Hatch J. in *Callicutt v. Callicutt*, 2014 MBQB 144, 2014 CarswellMan 339 (Man. Q.B.) at para. 93.

70 2010 CarswellOnt 5562, [2010] O.J. No. 3259 (Ont. C.J.) at para. 81, ; additional reasons 2011 CarswellOnt 14382 (Ont. C.J.).

71 2012 CarswellOnt 1107, [2012] O.J. No. 380 (Ont. S.C.J.); additional reasons 2012 CarswellOnt 5811 (Ont. S.C.J.); affirmed 2012 ONCA 655, 2012 CarswellOnt 12136 (Ont. C.A.); leave to appeal refused 2013 CarswellOnt 1557, 2013 CarswellOnt 1558 (S.C.C.).

72 2012 CarswellOnt 1107, [2012] O.J. No. 380 (Ont. S.C.J.) at para. 21, ; additional reasons 2012 CarswellOnt 5811 (Ont. S.C.J.); affirmed 2012 CarswellOnt 12136 (Ont. C.A.); leave to appeal refused 2013 CarswellOnt 1557, 2013 CarswellOnt 1558 (S.C.C.).

73 2012 CarswellOnt 1107, [2012] O.J. No. 380 (Ont. S.C.J.) at para. 49, ; additional reasons 2012 CarswellOnt 5811 (Ont. S.C.J.); affirmed 2012 CarswellOnt 12136 (Ont. C.A.); leave to appeal refused 2013 CarswellOnt 1557, 2013 CarswellOnt 1558 (S.C.C.).

74 2012 CarswellOnt 1107, [2012] O.J. No. 380 (Ont. S.C.J.) at para. 104, ; additional reasons 2012 CarswellOnt 5811 (Ont. S.C.J.); affirmed 2012 CarswellOnt 12136 (Ont. C.A.); leave to appeal refused 2013 CarswellOnt 1557, 2013 CarswellOnt 1558 (S.C.C.).

75 2011 EWCA Civ 361 (C.A.) at para. 69; quoted by Perkins J. at, 2012 CarswellOnt 1107, [2012] O.J. No. 380 (Ont. S.C.J.) at para. 96, ; additional reasons 2012 CarswellOnt 5811 (Ont. S.C.J.); affirmed 2012 CarswellOnt 12136 (Ont. C.A.); leave to appeal refused 2013 CarswellOnt 1557, 2013 CarswellOnt 1558 (S.C.C.).

76 [2006] UKHL 51 (U.K. H.L.) at para. 51; quoted by Perkins J. at, 2012 CarswellOnt 1107, [2012] O.J. No. 380 (Ont. S.C.J.) at para. 97, ; additional reasons 2012 CarswellOnt 5811 (Ont. S.C.J.); affirmed 2012 CarswellOnt 12136 (Ont. C.A.); leave to appeal refused 2013 CarswellOnt 1557, 2013 CarswellOnt 1558 (S.C.C.).

77 2012 ONCA 655, 2012 CarswellOnt 12136 (Ont. C.A.) at paras. 22-23, ; leave to appeal refused 2013 CarswellOnt 1557, 2013 CarswellOnt 1558 (S.C.C.).

78 2012 ONCA 655, 2012 CarswellOnt 12136 (Ont. C.A.) at para. 37, ; leave to appeal refused 2013 CarswellOnt 1557, 2013 CarswellOnt 1558 (S.C.C.).

79 *Droit de la famille — 111062*, 2011 QCCA 729, 2011 CarswellQue 4200 (C.A. Que.) at para. 5, per Dalphond & Bich JJ.A., ; leave to appeal refused 2011 CarswellQue 13709, 2011 CarswellQue 13710 (S.C.C.).

80 2005 CarswellOnt 6448, [2005] O.J. No. 4843 (Ont. S.C.J.).

81 2012 CarswellOnt 15620, [2012] O.J. No. 5825 (Ont. C.J.).

82 If the OCL is to be appointed in a Convention case, it is essential that the Office act quickly. In *Garelli v. Rahma*, 2006 CarswellOnt 2582, [2006] O.J. No. 1680 (Ont. S.C.J.), there was a request to appoint the OCL in a *Convention* case. The OCL took the position that it needed considerable time to investigate the child's wishes, and asked for a lengthier timetable than the court was happy with. The court therefore declined to appoint the OCL, and appointed an *amicus curiae* to represent the interests of the child, in order to expedite the hearing, calling the position taken by the OCL "regrettable and unhelpful".

83 2009 CarswellBC 1402 (B.C. S.C. [In Chambers]); additional reasons 2009 CarswellBC 1555 (B.C. S.C.); affirmed 2009 CarswellBC 2016 (B.C. C.A.).

84 2009 CarswellBC 1402 (B.C. S.C. [In Chambers]) at paras. 55-56, ; additional reasons 2009 CarswellBC 1555 (B.C. S.C.); affirmed 2009 CarswellBC 2016 (B.C. C.A.).

85 *S. (J.) v. M. (R.)*, 2012 ABPC 184, 2012 CarswellAlta 1252 (Alta. Prov. Ct.); affirmed 2012 CarswellAlta 1911 (Alta. Q.B.); reversed 2013 CarswellAlta 2536 (Alta. C.A.).

86 2012 ABQB 669, 2012 CarswellAlta 1911 (Alta. Q.B.); reversed 2013 CarswellAlta 2536 (Alta. C.A.).

87 2013 ABCA 441, 2013 CarswellAlta 2536 (Alta. C.A.).

88 *Den Ouden v. Laframboise*, 2006 ABCA 403, 2006 CarswellAlta 1693 (Alta. C.A.) at para. 16; quoted in *S. (J.) v. M. (R.)*, 2013 ABCA 441, 2013 CarswellAlta 2536 (Alta. C.A.) at para. 18. See also *Perez v. Polet*, 2014 MBQB 151, 2014 CarswellMan 352 (Man. Q.B.) where Allen J. declined to consider the views of an 8 year old child, as communicate to the court by a therapist retained by one parent. The court observed (at para. 63): "It would be a rare child, indeed, who would have the necessary maturity

and emotional understanding and strength to articulate his or her wishes in a meaningful way."

89 2013 ABCA 441, 2013 CarswellAlta 2536 (Alta. C.A.) at paras. 32 & 34; affirmed 2014 MBCA 82, [2014] M.J. 259.

90 2013 ABCA 441, 2013 CarswellAlta 2536 (Alta. C.A.) at paras. 24 & 28.

91 1994 CarswellOnt 400, 18 O.R. (3d) 753, 115 D.L.R. (4th) 489 (Ont. C.A.).

92 [2014] UKSC 1 (U.K. S.C.).

93 1994 CarswellMan 91, 1994 CarswellMan 382, [1994] 3 S.C.R. 551 (S.C.C.).

94 Above, at paras. 84-85.

95 See *Kirby v. Thuns*, 2008 CarswellOnt 5407, [2008] O.J. No. 3586 (Ont. S.C.J.) and *Juma v. Juma*, 2012 CarswellOnt 9014, [2012] O.J. No. 3305 (Ont. S.C.J.).

96 Sometimes the conditions imposed for the return of a child can be onerous on the parent making the application. In *S. (A.E.) v. W. (A.M.)*, 2012 CarswellAlta 2357, [2012] A.J. No. 1404 (Alta. Q.B.); affirmed 2013 CarswellAlta 427 (Alta. C.A.), the father successfully applied for the return of the child to the habitual residence in California. The mother had primary care, but the father was held to have been exercising "rights of custody" pursuant to the Convention. The court ordered that if the mother was returning with the child (which was most likely), the father has to provide the following:

97 See *Hoole v. Hoole*, 2008 CarswellBC 1951, [2008] B.C.J. No. 1768 (B.C. S.C.).

98 For an explanation of how such communication can be undertaken, see *Giesbrecht v. Giesbrecht*, 2013 MBQB 115, 2013 CarswellMan 237 (Man. Q.B.) This case actually involved judicial communication about parallel proceedings in different Canadian provinces, but the judge involved, Diamond J., is one of Canada's *Hague* liaison judges, and she offers some discussion of the *Hague* process as well.

99 See Hague Conference on Private International Law, Permanent Bureau, *Direct Judicial Communications* (2013) http://www.hcch.net/upload/brochure_djc_en.pdf

100 2012 CarswellOnt 1107, [2012] O.J. No. 380 (Ont. S.C.J.) at para. 120, ; additional reasons 2012 CarswellOnt 5811 (Ont. S.C.J.); affirmed 2012 CarswellOnt 12136 (Ont. C.A.); leave to appeal refused 2013 CarswellOnt 1557, 2013 CarswellOnt 1558 (S.C.C.).

101 2012 CarswellOnt 12136, [2012] O.J. No. 4580 (Ont. C.A.) at para. 32, ; leave to appeal refused 2013 CarswellOnt 1557, 2013 CarswellOnt 1558 (S.C.C.).

102 See "Conclusions and Recommendations of Part I and Part II of the Special Commission of the Practical Operation of the 1980 Child Abduction and the 1996 Child Protection Convention and a Report of Part II of the Meeting", April, 2012, available at http://www.hcch.net/upload/wop/concl28-34sc6_en.pdf.

103 2011 CarswellOnt 3972, [2011] O.J. No. 2449 (Ont. C.A.).

104 The exact circumstances of her return are not known, but she made her way to Canada on her own; for a description for this case, see Jeffery Wilson "Family Law in the 21st Century & the New Tools of the Trade: International Convention, *Parens Patriae* and the *Charter*," Law Society of Upper Canada Family Law Summit, May 6, 2013.

105 *B. (G.) v. M. (V.)*, 2012 CarswellOnt 15620, [2012] O.J. No. 5825 (Ont. C.J.).

106 2011 CarswellOnt 3972, [2011] O.J. No. 2449 (Ont. C.A.).

107 2013 ABCA 441, 2013 CarswellAlta 2536 (Alta. C.A.).

108 [2014] UKSC 1 (U.K. S.C.).

109 (2006), [2006] UKHL 51, [2007] 1 A.C. 619 (U.K. H.L.) at para. 59.

110 *M (Children) (Abduction: Rights of Custody), Re* (2007), [2007] UKHL 55, [2008] 1 A.C. 1288 (U.K. H.L.).

111 *I. (A.M.R.) v. R. (K.E.)*, 2011 ONCA 417, 2011 CarswellOnt 3972 (Ont. C.A.).

112 See *L.C. (Children) (International Abduction: Child's Objections to Return), Re*, [2014] UKSC 1 (U.K. S.C.) at para. 53, per Wilson L.

113 Bala "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child" (2006) 43 *Alberta Law Review* 845-870.

114 While judicial meetings with older children are often appropriate where the "best interests of the child" are at issue, there is less scope for such meetings in *Hague* cases, which typically involve neither a child's best interests nor wishes: see Bala, Birnbaum, Cyr & McColley, "Children's Voices in Family Court: Guidelines for Judges Meeting Children" (2013) 47 *Family Law Quarterly* 381-410.

115 Such as the Ontario Court of Justice; see Ontario *Children's Law Reform Act* s. 18.

116 N. Lowe, & V. Stephens, "Global trends in the operation of the 1980 Hague Abduction Convention" (2012) 46 Fam. L. Q. 41.

117 See *Achakzad v. Zemaryalai*, 2010 CarswellOnt 5562, [2010] O.J. No. 3259 (Ont. C.J.); additional reasons 2011 CarswellOnt 14382 (Ont. C.J.), where the court ordered an expedited trial because of the credibility issues in the case. In *Kubera v. Kubera*, 2010 CarswellBC 510, [2010] B.C.J. No. 383 (B.C. C.A.), the child was taken from her habitual residence when she was three years old. The matter did not reach trial until the child was 8, and the appeal was not heard until she was 9.

118 See *S. (J.) v. M. (R.)*, 2012 CarswellAlta 1252, [2012] A.J. No. 779 (Alta. Prov. Ct.); affirmed 2012 CarswellAlta 1252 (Alta. Q.B.); reversed 2013 CarswellAlta 2536 (Alta. C.A.), in which the court heard the matter by way of affidavit evidence. Similarly, in *Mitchell v. Mitchell*, 2009 CarswellOnt 911, [2009] O.J. No. 740 (Ont. S.C.J.), Polowin J., ; additional reasons 2009 CarswellOnt 1628 (Ont. S.C.J.) heard an application pursuant to the *Convention* on the basis of affidavit evidence only. See also *Mindermann v. Mandall*, 2010 CarswellOnt 3413, [2010] O.J. No. 2122 (Ont. C.J.).

119 2008 CarswellOnt 6633, [2008] O.J. No. 4480 (Ont. C.A.) at para. 33. See also *Abib v. Abib*, 2010 CarswellOnt 9124, [2010] O.J.

No. 5202 (Ont. C.A.), where the Court suggests that oral evidence may be limited to cases in which the parent resisting the return of a child raises the argument, provided for in Article 13b, that if a child is returned, there is a "grave risk" of physical or psychological harm, or that the return would place the child in "an intolerable situation".

120 *H. (A.) v. H. (F.S.)*, 2013 ONSC 1308, 2013 CarswellOnt 2510, 28 R.F.L. (7th) 163, [2013] O.J. No. 1011 (Ont. S.C.J.), per Kruzick J.

121 2010 ONCA 347, 2010 CarswellOnt 2981, 102 O.R. (3d) 298 (Ont. C.A.) at paras. 37-38, ; additional reasons 2010 CarswellOnt 4016 (Ont. C.A.).

122 2013 ONSC 1308, 2013 CarswellOnt 2510, 28 R.F.L. (7th) 163, [2013] O.J. No. 1011 (Ont. S.C.J.), per Kruzick J., at para. 66.

123 *A.H. v. C.F.S.H.*, 2013 ONCA 227.

124 2012 CarswellOnt 1107, [2012] O.J. No. 380 (Ont. S.C.J.); additional reasons 2012 CarswellOnt 5811 (Ont. S.C.J.); affirmed 2012 CarswellOnt 12136 (Ont. C.A.); leave to appeal refused 2013 CarswellOnt 1557, 2013 CarswellOnt 1558 (S.C.C.).

125 Leave to appeal to the Supreme Court of Canada was refused 2013 CarswellOnt 1557, 2013 CarswellOnt 1558, [2012] S.C.C.A. No. 485 (S.C.C.), or this matter would have taken even longer.

126 *Solem v. Solem*, 2013 ONSC 1097, 2013 CarswellOnt 1699 (Ont. S.C.J.); additional reasons 2013 CarswellOnt 8639 (Ont. S.C.J.); additional reasons 2013 CarswellOnt 16977 (Ont. S.C.J.).

127 *Solem v. Solem*, 2013 ONSC 4318, 2013 CarswellOnt 8639, [2013] O.J. No. 2960 (Ont. S.C.J.); additional reasons 2013 ONSC 7467, 2013 CarswellOnt 16977, [2013] O.J. No. 5539 (Ont. S.C.J.)

128 See e.g. *Husid v. Daviau*, 2012 ONCA 655, 2012 CarswellOnt 12136 (Ont. C.A.) at para. 40, ; leave to appeal refused 2013 CarswellOnt 1557, 2013 CarswellOnt 1558 (S.C.C.), where the respondent mother was awarded almost $80,000 in costs; however, it would appear that this sum was not paid; see *Daviau v. Husid*, 2014 CarswellOnt 7115, [2014] O.J. No. 2537 (Ont. S.C.J.).

129 Nigel Lowe & Victoria Stephens, "Global Trends in the Operation of the 1980 Hague Abduction Convention"(2012), 46 Fam. L. Q. 41.

130 HCCH Publications, *Guide to Good Practice Child Abduction Convention — Mediation* (2012). http://www.hcch.net/upload/guide28mediation_en.pdf.

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