International Child Abduction and *Hague Convention* Applications

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It is every parents' worst nightmare. It is what we as family lawyers assure our client's is "extremely rare". "It", being a situation when one parent unilaterally retains the children in a country where the children are not habitually resident, or where one parent flees to another country with the children.

Within the past year I have appeared before the court on this type of matter on two occasions. In both situations I represented clients who lived overseas, and desperately sought to have their children returned to their country of habitual residence after the children had been wrongfully retained in Canada. Although rare, we are faced with these types of fact scenarios from time to time. This article is meant to provide some guidance in the event that you are faced with this issue. You will also want to familiarize yourself with *The Queen's Bench Rules* 15-69 through 15-77 as they set out the procedure for these types of applications.

The Hague Convention on the Civil Aspects of International Child Abduction ("*Hague Convention*"), is a multi-national treaty which seeks to protect children from cross-border abductions and retentions by providing a procedure under which children can be returned to their country of habitual residence. According to the website for the *Hague Convention* on Private International law (www.hcch.net/en/home), there are presently 98 contracting states to the *Hague Convention*. Canada is a signatory to the *Hague Convention* and *The International Child Abduction Act, 1996* SS 1996, c I-10.11, adopts the *Hague Convention* in Saskatchewan. The first step in your application will be to ensure that the country where the children are habitually resident is also a signatory to the *Hague Convention*.

Both clients had contacted the Central Authorities within their countries and made applications for the return of their children before retaining me. Each signatory to the *Hague Convention* has a Central Authority, which is a government agency providing information and assistance with Convention applications. In both cases I was involved with, the Central Authorities reached out to the parent who was unlawfully retaining the children in Canada, seeking a voluntary return, to no avail. This is when I was retained. It is worth noting that in bringing a *Hague Application* you must serve notice of such on the Central Authority in Saskatchewan.

In bringing an application for the return of children under the *Hague Convention*, you must first demonstrate that the children are habitually resident in the foreign jurisdiction. The case of *Karutowska-Woof v Karutowska* 2004 CanLII 5548 (ON CA), is instructional on this point, stating at paragraph 8 that a determination of habitual residence is factual and is the place where one resides for some time with a "settled intention" to stay in that place.

Once habitual residence has been established you must demonstrate that the removal of the children was wrongful. The Supreme Court of Canada in *Thomson v Thomson* 1994 3 SCR 551 observed at pp. 592 that, "a wrongful retention begins from the moment of the expiration of the period of access, where the original removal was with the consent of the rightful custodian of the child". In the case of *S.K. v J.Z.* 2017, SKQB 136, the parties were on a family holiday from Australia to Canada. The father returned to Australia on

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the understanding that the mother and children would follow on a specified date; airplane tickets had been purchased. After the father left Canada the mother advised that she was terminating her relationship with him and refused to return the children to Australia on the agreed upon date; this began the unlawful retention of the children in Canada.

The *Hague Convention* allows exceptions to the mandatory return procedure for children wrongfully removed/retained. One exception is Article 12 of the *Hague Convention*, that a child is “now settled”. Article 12 states that “if a child has been wrongfully retained for less than one year, the authority shall order the return of the child forthwith.” If proceedings to return the child commence after the one year expiration date, the court shall also order the return of the child, unless it is demonstrated that the child is now settled in the new environment.

Article 13(a) of the *Hague Convention* states that the judicial authorities are not bound to order the return of a child if the person not exercising access at the time of the removal/retention had consented or acquiesced. The Ontario Court of Appeal, in the case of *Katsigiannis v Kottick-Katsigiannis*, 2001 55 O.R., held that the abducting parent must show “clear and cogent evidence of an unequivocal consent” (para. 43). Further, acquiescence is a question of the aggrieved parent’s subjective intention, not one of the outside world’s perceptions of that intention, (*Katsigiannis supra* at para. 48). In *S.K. supra*, Mr. Justice Dufour allowed a *viva voce* hearing (which is allowed in rare circumstances under the *Hague Convention*), as the central issue was whether the aggrieved parent had consented or acquiesced to the retention of the children. The parties’ affidavits were diametrically opposed and credibility was at issue. The *viva voce* hearing allowed for an assessment of credibility, and confirmed the father’s subjective intention that consent was not provided.

Lastly, Article 13(b) of the *Hague Convention* directs that a child shall not be returned to their country of habitual residence if there is a grave risk that the return would expose the child to physical or psychological harm or otherwise put the child in an intolerable situation. The case law is clear that the risk must be substantial and not trivial. In the case of *Pollastro v Pollastro,* 1999 CarswellOnt 848, (Ont. C.A.), the court stated that the focus on this exception is on the danger of returning a child to its place of habitual residence, and not the benefit of allowing a child to remain. The focus must be on how the particular request to return the child exposes that particular child to a substantial risk of substantial harm. It is important to keep in mind when bringing a *Hague Application* that the court is not engaging in a “best interest test”, as they would in a custody and access application. It is anticipated that the contracting states to the *Hague Convention* will properly take the best interest of the child into account upon the child’s return to their country of habitual residence.

If you bring a *Hague Application* you should provide the court with sufficient evidence as to the legal and other costs that your client has incurred as a result of the retention of the child, as the *Hague Convention* allows for generous costs to successful applicants. Article 26 of the *Hague Convention* grants the court authority to direct that the person responsible for any wrongful removal or retention, “ pay any necessary expenses incurred by or on behalf of the applicant, including travel expenses and costs incurred or payments made for locating the child, the costs of legal representation of the applicant and those of returning the child”. Rule 15-77(1) of *The Queen’s Bench Rules* grants further authority for costs on *Hague Convention* applications. ⚖

This article was intended to give the reader some insight and guidance on the steps to be taken when a potential client’s child is taken from their country of habitual residence. Following the Hague Convention and the instruction of our courts may assist in finding some resolution in these often complex and time-sensitive matters.