The 1980 Hague Convention on Civil Aspects of International Child Abduction: British Columbia's Treatment of Hague Cases

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Introduction

The *1980 Hague Convention on Civil Aspects of International Child Abduction* (*Convention*) is an international treaty that entered into force in Canada on December 1, 1983. British Columbia was one of four provinces in which the *Convention* became law at that time, with subsequent extension to all other Canadian provinces and territories following in the years after. Nunavut, the new Canadian territory established in 1999, was the last Canadian territorial unit to bring the *Convention* into force, doing so on January 1, 2001. In British Columbia, the *Convention* is given the force of law under the *Family Law Act*[1], formerly the *Family Relations Act*[2].

This paper will describe British Columbia's role in, and treatment of, cases brought under the *Convention*. It will do so by looking at three aspects of the *Convention*: the role of British Columbia's Central Authority, the Practice Directions and procedural protocols for British Columbia, and a brief overview of recent British Columbia case law on applications brought under the *Convention*.

Central Authority

Article 6 of the *Convention* requires a contracting state to "designate a Central Authority to discharge the duties which are imposed by the Convention".[3] As such, Canada has established the Minister of Justice and Attorney General of Canada as the Central Authority through which to fulfill its obligations under the *Convention* as a contracting state. Also, each province and territory have their own central authorities, allowing each jurisdiction to carry out their duties under the *Convention* pursuant to their system of law. The Central Authority in British Columbia is the Family Justice Branch of the Attorney General of British Columbia and Ms. Penelope Lipsack, a lawyer with the Ministry of Justice, has been designated the responsibility of the Central Authority.

The obligations of a Central Authority are listed in Article 7 of the *Convention* with the main objective being that Central Authorities from contracting states work together to ensure the prompt return of a wrongfully removed child. Article 7 requires that Central Authorities, "either directly or through any intermediary, [sic] take all appropriate measures" to find the child and arrange for its safe return. Moreover, the Central Authority is responsible for providing information on the character of the law of their State, as well as keeping other contracting states informed about the operation of the *Convention*, working to eliminate any difficulties in its application. Thus, the Central Authority serves as a hub of communication between other contracting states' Central Authorities, the Canadian network of judges assigned to *Convention* cases, the court

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[1] SBC 2011, c 25, s 80 (CanLII).
[2] RSBC 1996, c 128, s 55 (CanLII).
[3] Hague Conference on Private International Law c. 28, *Convention on the Civil Aspects of International Child Abduction* (25 October 1980) online: Hague Conference on Private International Law <www.hcch.net> [*Convention*].

involved, any other external agencies involved (such as police or R.C.M.P.), and the left-behind parent.

If a child has been removed from British Columbia the left-behind parent should contact the Central Authority in British Columbia as soon as possible. The Central Authority will make a decision on whether the case fits the parameters of the *Convention* before proceeding with an application under the *Convention*. Generally, a broad view is taken of whether a case fits within the *Convention*, leaving it up to the courts to decide if a return is mandated. The Central Authority often appears in court on behalf of the left-behind parent, regardless of the jurisdiction, and will constantly communicate with the other contracting state's Central Authority.

Whether the child has been removed from or brought to British Columbia, the left-behind parent can contact the Central Authority here for assistance in finding legal counsel and securing legal aid.[4] With respect to legal aid, typically the Central Authority will send an application on behalf of the left-behind parent to the Legal Services Society, the organization that provides legal aid in British Columbia. The Legal Services Society determines whether the parent qualifies for legal aid. However, if the parent does not qualify, the Central Authority may also assist the parent in finding pro bono legal services.[5]

Practice Directions and Procedural Protocol

Canada has two liaison judges who are part of an international network of judges for the *Convention*. These two judges, Justice Jacques Chamberland for the civil law system and Justice Robyn M. Diamond for the common law system, form the Special Committee on International Parental Child Abduction (Special Committee) in Canada.[6] Together they are a point of contact for communication between international judges and the Canadian Network of Contact Judges for Inter-jurisdictional Cases of Child Protection (the Network). British Columbia's representative on the Network, the Honourable Mr. Justice Bruce Butler, is the Superior Court judge who facilitates

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[4] Article 26 of the Convention requires that "each Central Authority shall bear its own costs in applying this convention. Central authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention". However, the Government of Canada has declared a Reservation in accordance with Article 42 (which grants reservations to Article 26), that with respect to applications concerning British Columbia, Canada will assume these costs only insofar as they are covered by the system of legal aid in the province. This is a standard reservation for all provinces and territories in Canada, except Manitoba. Manitoba has not declared any reservations. For more information on access to justice in the context of the Convention see *Special Commission on the practical operation of the 1980 and 1996 Hague Conventions* (1-10 June 2011) at para 32-34 online: Hague Conference on Private International Law <http://www.hcch.net/upload/concl28sc6_e.pdf>.

[5] The Legal Services Society also offers a mentoring program for referral lawyers with less than 5 years' call. The program is designed to help lawyers navigate more complex cases. Mentoring referrals for cases involving the Hague convention are considered under the scope of the Family Tariff. See also: Legal Services Society, *Mentoring Counsel* (August 2011) online: Legal Services Society <http://www.lss.bc.ca/assets/lawyers/practiceResources/mentoringCounsel.pdf>.

[6] The Honourable Madam Justice Robyn Moglove Diamond, "International Judicial Initiatives Dealing with Cross Border Child Protection," *6th World Congress on Family Law and Children's Rights* (2013) 7-10 online: <http://www.lawrights.asn.au/papers/International%20Judicial%20Initiatives%20Dealing%20-%20Robyn%20Diamond.doc>.

communication between the Special Committee and Provincial/Territorial and Superior Court judges dealing with *Convention* cases.

Since their inception, the Special Committee and the Network have worked to develop judicial training material and to streamline processes for cases involving inter-jurisdictional child abduction.[7] For example, a Hague Convention Electronic Benchbook (EBB) has been developed by a group of Canadian Network judges (together with the National Justice Institute) to assist Canadian judges in dealing with these complex *Convention* cases. The EBB contains procedural and analytical frameworks, as well as case management strategies, and was released for distribution to Canadian judges in 2011.[8]

The Network has also approved a Procedural Protocol, modeled on the combined efforts of Manitoba's Central Authority and Court of Queen's Bench, which other provinces have adopted and modified to their jurisdiction. The Supreme Court of British Columbia has adopted the Protocol and established a Practice Direction describing procedural protocols to be followed for return applications brought under the *Convention*.[9] These protocols ensure that return applications under the *Convention* are dealt with expeditiously, as required by Article 11.[10]

So too, the British Columbia Court of Appeal has established a Practice Directive on the protocol for appeals involving the inter-jurisdictional abduction of children, including those that engage the *Convention*.[11] In order to expedite appeals, the Practice Directive requests that the Registrar be made aware of the issue so that that a pre-hearing conference can be arranged. This conference will be scheduled immediately and is meant to arrange an expedited hearing date, organize the materials required for the hearing, and make any ancillary orders needed.

The importance of judicial communication has also been emphasized in British Columbia *Convention* cases. In *Hoole v. Hoole*, Madam Justice Martinson set the precedent for the appropriateness of the Supreme Court of British Columbia

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[7] *Ibid* at 10-12.
[8] *Ibid* at 38. The EBB is also available to non-Canadian judges by emailing thehague@nji-inm.ca.
[9] Supreme Court of British Columbia, FPD-9 Practice Direction: Return Applications under the 1980 Hague Convention on the *Civil Aspects of International Child Abduction* – Procedural Requirements (18 March 2013) online: Supreme Court of British Columbia <http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions/family/FPD%20-%209%20Return%20Applications%20pursuant%20to%201980%20Hague%20Protocol%20-%20Procedural%20Requirements%20(website).pdf>.
[10] *Convention*, *supra* note 3. Article 11 states, "The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of the children".
[11] British Columbia Court of Appeal, Practice Directive (Civil): Hague Protocol for Appeals Regarding the Inter-jurisdictional Abduction of Children, including international abductions engaging *The 1980 Hague Convention on the Civil Aspects of International Child Abduction* (19 July 2011) online: <http://www.courts.gov.bc.ca/court_of_appeal/Practice_and_Procedure/civil_practice_directives_/Civil-Hague%20Protocol%20for%20Appeals%20Regarding%20the%20Inter-jurisdictional%20Abduction%20of%20Children.htm>.

communicating directly with other state courts in cross-border child custody cases.[12] Though *Hoole* is not a *Convention* case, Madam Justice Martinson held that the principle of judicial cooperation and communication are the same in cases of cross-border wrongful removal of children, whether or not the Hague *Convention* is engaged.[13] Since *Hoole*, the Supreme Court of British Columbia has adopted a Practice Direction on court to court communications in cross-border cases. This directive confirms the adoption of the *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases*, a guide written by The American Law Institute in 2000.[14]

Convention **Applications Heard in British Columbia**

Object of the *Convention*

A recent decision of the Supreme Court of British Columbia highlighted four principle objectives of the *Convention*. In *Rush v. Biggs*, Justice Johnson articulated the four objectives as:

1. The general deterrence of child abduction or wrongful retention,
2. The need for prompt return of the child,
3. The restoration of the status quo; and
4. To entrust the courts of habitual residence with the determination of what is in the child's best interests.[15]

In *Kubera v. Kubera,* the British Columbia Court of Appeal held that the scope of the above objectives is given breadth in Article 12 whereby, subject to time constraints, if a child has been wrongfully removed or retained, then the authority concerned should order the return of the child forthwith, unless the child is settled in its new environment.[16] Thus, the objectives of the *Convention* have been interpreted and applied in British Columbia as protecting the interests of children generally, with the determination of those interests left to the courts in the place where the child is habitually resident. As held by J.A. Levine in *Kubera*,

> It is through this obligation of swift mandatory repatriation that the *Convention* pursues its principal object: to protect children from the harmful effects of child abduction by deterring and, where appropriate, remedying their wrongful removal or retention.
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> The *Convention* operates on a basic presumption that a child's best interests, and the rights of custody and access that relate to them, should

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[12] 2008 BCSC 1248 [*Hoole*].
[13] *Ibid* at para 27.
[14] Supreme Court of British Columbia, PD-6 Practice Direction: Court to Court Communications in Cross-Border Cases (18 March 2013) online: Supreme Court of British Columbia <http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions_and_notices/General/Guidelines%20Cross-Border%20Cases.pdf>.
[15] 2013 BCSC 1133 at para 95-96 [*Rush*].
[16] 2010 BCCA 118 [*Kubera*].

be determined by the courts in the country where he or she is habitually resident: *W. (V) v. S. (D)*, [1996] 2 S.C.R. 108 at para. 36.[17]

Therefore, in order to fulfill the objectives of the *Convention*, it is necessary for the courts to determine whether the removal or retention of the child is wrongful and, in doing so, establish the habitual residence of the child.

Habitual Residence of the Child

Since the *Convention* does not define habitual residence, it has been left to the courts to do so. However, British Columbia's legislative definition of habitual residence in the *Family Relations Act* does not apply. In *Chan v. Chow*, the court held that worldwide consistency in the application of the *Convention* would be lost if individual jurisdictions relied on their definitions of habitually resident.[18] This is in keeping with the Supreme Court of Canada's decision in *Thomson v. Thomson*, where La Forest J. held that the provisions of a domestic Act and the *Convention* operate independently of on another.[19]

In *Chan*, the British Columbia Court of Appeal adopted three factors for defining habitual residence:

1. The question is a question of fact to be decided by reference to all the circumstances of the case;
2. An "habitual residence" is established by residing in a place for an appreciable period of time, with a "settled" intention;
3. A child's "habitual residence" is tied to the habitual residence of his or her custodian(s).[20]

This test was also used by the Supreme Court of British Columbia in *Fasiang v. Fasangova*, but was complemented with three other factors from *Blanchard v. Wuest*, a Supreme Court decision made prior to *Chan*.[21] At paragraph 17 of *Blanchard* the factors are listed as:

1. An appreciable period of time and a settled intention;
2. A residence adopted voluntarily and for a settled purpose;
3. A quality of residence as something midway between domicile and residence.[22]

In *Fasiang*, Madam Justice Martinson thoroughly canvassed the authorities on settled intention and appreciable period of time, as they pertain to the above factors. With respect to settled intention, she found that generally there is a purpose for living where one does, even if it is for a limited amount of time. As well, that purpose is usually decided prior to the move, and the habitual residence effectively changes when the

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[17] *Ibid* at para 31-32.
[18] 2001 BCCA 276 [*Chan*].
[19] [1994] 3 SCR 551 at 603 [*Thomson*].
[20] *Chan, supra* note 18 at para 32.
[21] 2008 BCSC 1339 [*Fasiang*].
[22] 2000 BCSC 592 [*Blanchard*].

family has taken steps to permanently move to another country. In cases where the parties no longer agree that they shared an intention to change a child's habitual residence, the court "should not take the representations made by parties at their face value. Instead, courts should determine, based on all the evidence, whether the parent has already agreed to change the child's habitual residence".[23] In other words, if one parent decides that the move is not what they really wanted to do, they may not unilaterally take the child from their new habitual residence.[24]

With respect to an appreciable period of time, Madam Justice Martinson found that it is a question of fact, and not a fixed period of time. The case law that she surveyed varied an appreciable period of time from being as short as one day, or one month, to nine months. For example, she cites *Braatelien v. Horning*, [2001] O.J. No. 3799 in which a mother acquired habitual residence in her new location when she arrived, as did her children who were travelling with her.[25] The factors in determining whether there has been an appreciable period of time, such that habitual residence can be established, are similar to those of determining settled intention: what possessions were brought into the new country, what steps were taken in preparation of travelling to the new country, and what kind of familial or other ties and housing considerations are there in the new country.

Thus, parental intent and actions taken before the move are important considerations in establishing habitual residence, but they must also accord with an appreciable period of time in the new habitual residence. Moreover, as held in *Chan*, all these factors are to be determined on a case-by-case basis.[26] Consequently, the court is likely to take a holistic view of the circumstances of the parents and child(ren) before, during and after any move to a new habitual residence.

Wrongful Removal and Retention of the Child

Wrongful removal and retention are defined by Article 3 of the *Convention* as breaches of rights of access or custody, providing those rights were being exercised at the time of the breach. If the child is found to be habitually resident in another contracting state, that state's laws will determine how and to whom the rights of custody will be attributed. As such, breaches of rights of custody are determined by the state law which grants that right. The Supreme Court of Canada has identified three approaches to determining the nature of the custody right required by the *Convention*: as belonging to the custodial parent, the access parent, or the court that has the issue before it.[27]

In *Fasiang*, Madam Justice Martinson followed *Thomson* regarding the court's custodial rights of children. There she held that,

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[23] *Fasiang*, *supra* note 21 at para 67.
[24] *Ibid* at para 66.
[25] *Ibid* at para 72.
[26] *Chan, supra* note 18 at para 32.
[27] *Thomson*, *supra* note 19.

> Where a foreign court is properly and actively seized of an issue as to where the child should reside, and where, while those proceedings are pending, the child is removed from its place of habitual residence without the consent of the court, the court hearing the application for return must recognize those rights of custody in the foreign court. There need not be an order relating to custody or residency in place.[28]

However, in *Blanchard* the court held that if foreign law with respect to custody is not established by the evidence, then the law in British Columbia will apply.[29] In that case, Justice Grist likened the Article 3 rights of custody in courts to section 27(2)(b) of the *Family Relations Act* pertaining to Parental Guardianship:

> *27(2)…if the father and mother of a child are or have been married to each other and are living separate and apart,*
>
> *(b) the one of them who usually has care and control of the child is the sole guardian of the person of the child unless a tribunal of competent jurisdiction otherwise orders.*[30]

Article 15 provides that a requested state may ask the state of habitual residence of the child for a determination on whether the removal was wrongful, but there have been some problems in the application of this Article, including delays of hearing the return application in the requested state.[31] For example, in *Johnson v. Jessel*, the left-behind parent filed a return application in Germany where the child was taken.[32] The German Central Authority then contacted Ms. Lipsack in British Columbia requesting an Article 15 determination because it had doubts about the wrongfulness of the removal according to British Columbia law. In his determination, Justice Butler held that at the time of the removal the court was exercising its rights of custody by virtue of the ex parte interim order granting the mother sole custody and guardianship. The mother promptly appealed that decision in the British Columbia Court of Appeal.

Upholding the decision of the lower court in *Johnson*, the Court of Appeal stated that both interim orders and the *Convention* must be interpreted as granting courts rights of custody when they have the issue before them. The Court continues, "were this not so it would follow that in any case of spouses asserting competing claims to sole custody of children, either one could simply obtain an ex parte order for interim custody on whatever he or she put before the court, and then take the children to another jurisdiction on the strength of that order".[33]

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[28] *Fasiang*, *supra* note 21 at para 96-97.
[29] *Blanchard*, *supra* note 22 at para 25.
[30] RSBC 1996, c 128, s 55 (CanLII).
[31] *Special Commission on the practical operation of the 1980 and 1996 Hague Conventions* (1-10 June 2011) at para 63 online: Hague Conference on Private International Law <http://www.hcch.net/upload/concl28sc6_e.pdf>.
[32] 2012 BCSC 1055 [*Johnson*].
[33] *Johnson v. Jessel*, 2012 BCCA 393, leave to appeal refused 2012 SCCA No. 483, at para 49.

After determining who held the rights of custody at the time of removal or retention, Article 3(b) requires that the rights of custody were exercised or would have been but for the wrongful removal or retention. In *Rush,* the court references factors set out in *J.L. v. British Columbia (Director of the Child, Family and Community Service Act)* to determine whether the left-behind parent was exercising custody rights at the time of removal:

a. Did the parent keep or seek to keep any sort of regular contact with the child?
b. Did the parent attempt to maintain a somewhat regular relationship with the child?
c. Did the parent maintain the stance and attitude of a custodial parent?
d. Are there any acts of the parent that constitute clear and unequivocal abandonment of the child?[34]

Citing the U.S Court of Appeals case *Friedrich v. Friedri*ch, 78 F. 3d 1060, the Honorable Mr. Justice Butler in *J.L.* found that the left-behind parent does not have a high threshold to meet to show they were exercising custody rights. Quoting from page 1066 of *Friedrich* Justice Butler notes,

> If a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to "exercise" those custody rights under the Hague *Convention* short of acts that constitute clear and unequivocal abandonment of the child.[35]

Further, the onus of proving that the left-behind parent was not exercising their custody right is on the abductor.[36]

Finally, the *Convention* is not meant to decide custody and access applications, although there are some such cases that are set aside pending the outcome a *Convention* application, pursuant to Article 16.[37] A decision under the *Convention* is not to "be taken to be a determination on the merits of any custody issue".[38] However, where a parent wrongfully removes a child then later accepts the foreign court's jurisdiction by seeking orders from the foreign court, the child is not wrongfully retained. In *Hu v. Hu*, a British Columbia mother received an ex parte order from a foreign court granting her interim custody pending a hearing later that year.[39] When the father filed an application under the *Convention*, the British Columbia Court of Appeal held that the

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[34] 2010 BCSC 1234 at para 43 (CanLII) [*J.L.*].
[35] *Ibid* at para 42.
[36] *Ibid* at para 40.
[37] *Convention*, *supra* note 3. Article 16 states, "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 custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of notice."
[38] *Convention*, *supra* note 3 at Article 19.
[39] 2010 BCCA 484 [*Hu*].

foreign court clearly knew that the mother was in British Columbia with the children at the time of the interim order, the mother was co-operating with that order and, as such, the removal of the children was not wrongful.

Defences

If a child is found to be wrongfully removed or retained, and it has been less than one year since the removal or retention, then the court must order the child's return forthwith. If it has been over a year since the removal or retention, then the court has discretion on ordering the return in cases where it is demonstrated that the child is now settled in its new environment. Article 13 of the *Convention* provides three other defences to the immediate return of a child wrongfully removed or retained:

a) Custody rights were not being exercised at the time of removal or retention, or there had been a consent or acquiescence to the removal or retention,

b) There is a grave risk that returning the child would expose them to physical or psychological harm or would place the child in an intolerable situation; or

c) The child objects to the return and the court finds it appropriate to take account of their views due to the child's age and degree of maturity.[40]

However, a brief look at each of these defences will show that, in British Columbia, there is a high threshold to meet in order to set aside the *Convention*'s objective of returning a wrongfully removed child.

The "Now Settled" Exception

In *Kubera*, the Court of Appeal discusses the "Now Settled" exception at length.[41] In that case, the father was appealing an order that found his daughter had been wrongfully retained in Canada by her mother, but that she was now settled and should not be returned to him in Poland. The main issue on appeal in this case was a question of at what point meeting the *Convention*'s objective of immediate return is outweighed by the further harm that would be done to a child by removing them from an environment in which they are now settled. The *Convention*, however, gives little guidance on what circumstances would tip the balance into no longer supporting a mandatory return of the child.

Referring to the Nova Scotia Court of Appeal decision in *J.E.A. v. C.L.M.*, 2002 NSCA 127, the court in *Kubera* determined the best approach to the "now settled" exception is a child-centric one.[42] Citing J.A. Cromwell (as he then was) at paragraph 82 of *J.E.A.*, Levine J.A. reiterates,

> The concept of settlement is invariably one of degree. For the purposes of the factual inquiry under Article 12, "settlement" requires more than a

[40] *Convention*, *supra* note 3.
[41] *Kubera*, *supra* note 16.
[42] *Ibid* at para 48.

> mere adjustment to surroundings, and includes "a physical element, relating to being established in a community, and an emotional element, relating to security and stability". Assessing the stability of the child's position involves examining "the child's future prospects as well as his or her current circumstances.[43]

While the general purpose is to determine the effect of uprooting a child who has already been subject to international relocation, Levine J.A. held that this purpose can only be achieved by considering the question from the child's perspective. Therefore, "other considerations external to that perspective such as comparative parental turpitude, would only serve to obscure the inquiry, and are relevant at this stage of the analysis only if they have a direct impact on the factual integration of the child".[44]

When deciding the relevant time for the factual assessment of the child's settlement into the new environment, Levine J.A. determined that the plain language of Article 12 was sufficient to be determinative. Given that a court will only need to take up the issue of the child being settled after it has decided that the child was wrongfully removed or retained, it follows that any assessment of the child's integration should occur at the time of the hearing. This is emphasized by the *Convention* drafters' use of the present tense "now settled in its new environment".[45]

Though the father in *Kubera* argued that the evidence of settling in must overwhelm *Convention* policy, the court found that, in this case, 7 years in the daughter's new stable and secure environment was enough to give effect to the exception that the *Convention* provides. Consequently, while the girl's removal from Poland and retention in Canada was found wrongful under the *Convention*, the "now settled" exception applied and the girl ought not to be uprooted again.

<u>Acquiescence to the Removal</u>

The first defence listed in Article 13 of the *Convention* is that the left-behind parent was not exercising custody rights or had consented to, or subsequently acquiesced to, the removal or retention. In determining acquiescence, the Supreme Court of British Columbia in *Rush* used the test set out by the Ontario Court of Appeal in *Katsigiannis v. Kottick-Katsigiannis*.[46] The test, which followed authorities in the US and England, is a subjective test that requires "clear and cogent evidence of unequivocal consent or acquiescence".[47] Defining consent as an agreement to something, the court goes on to find acquiescence as "subjective consent determined by words and conduct, including silence, which establishes the acceptance of, or acquiescence in, a child's removal or retention".[48] Thus, there is a high threshold to show consent or acquiescence, and the burden is on the person raising the defence to prove it.

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[43] *Ibid* at para 45.
[44] *Ibid* at para 46.
[45] *Ibid* at para 52.
[46] [2001] OJ No. 1598 (Ont. CA) [*Katsigiannis*].
[47] *Rush*, *supra* note 15 at para 101.
[48] *Ibid* at para 101.

In *Mathews v. Mathews*, there appeared to be consent for a wife to move their children from Australia to Canada, but the father argued his consent was not validly obtained.[49] The court found that though consent had been ostensibly obtained, the mother had mislead the father into believing that the family would be together once they were all in Canada. Interestingly, not only did Justice Barrow not accept that the mother had made her intentions clear, he held that even if the consent was validly obtained, Article 13 provides discretionary powers to the court when the defences are engaged and he would have ordered the return of the children in any case.

Risk of Physical or Psychological Harm

Thomson is still the leading test in Canada for determining the "grave risk of harm" in an Article 13(b) defence to not returning the child. In *G.A.G.R v. T.D.W.,* Justice Butler reiterated that "the nature of the "grave risk of harm" must be informed by the concept of placement of the child in "an intolerable situation"".[50] As such, he held that to satisfy the test, a party opposing the return of a child must show that the child would suffer harm to a degree that amounts to an intolerable situation.

Further, as upheld in *Thomson*, the proper test for determining "grave risk of harm" is set out in *Re A. (A Minor) (Abduction)*, [1988] 1 F.L.R. 365 (Eng. C.A.) at 372:

> . . . the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree . . . that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words 'or otherwise place the child in an intolerable situation'.[51]

Justice Butler summarizes the law nicely in *G.A.G.R*.:

> Before a court will apply the exception in Article 13(b), there must be credible evidence to establish that the child will be placed in an intolerable situation if returned to the country of habitual residence. It matters not how that risk might arise, and it is possible for a violent home environment to create such a risk. The evidence to establish a risk of physical or psychological harm must be credible and the risk must be weighty and substantial. Further, it must be the kind of risk against which the courts or government services of the country are unable or unwilling to protect the child. The threshold for reliance on Article 13(b) is, indeed, very high.[52]

Child's Views

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[49] 2007 BCSC 1825 [*Mathews*].
[50] 2013 BCSC 586 at para 21 [*G.A.G.R.*].
[51] *Thomson*, *supra* note 19 at 597.
[52] *G.A.G.R.*, *supra* note 50 at para 23.

Finally, the third exception to the immediate return of a wrongfully removed or retained child is the authority the court has to hear the views of a child if they object to being returned. Pursuant to Article 13, the child must be of an age and maturity such that it is appropriate for the court to take account of its views. As discussed above, the purpose of the *Convention* is to keep the interests of children paramount and protect them from the harmful effects of abduction. In this respect, the Supreme Court of Canada has interpreted the interest of children to mean the interests of children generally, and "not the interest of the particular child before the court".[53] Thus, the complexity of the court's discretion to consider the views of a child who objects to being returned lies in the necessity of giving effect to the objective of the *Convention* while at the same time giving appropriate weight to the views of the child.

In a case where an 11 year old boy was found to be wrongfully removed from his mother in Ireland and did not want to be returned, the British Columbia Court of Appeal held that the best interests of the child are not whatever the child wishes.[54] While the court agreed that the trial judge had appropriately considered the child's views, it affirmed the trial judge's finding that taking a child's views into account does not mean that those views are always determinative.[55] In particular, the court held that respecting the rights of custody and access under the laws of contracting states is an important policy factor, especially since the Irish court had the issue before it and would be deciding on custody and access in the child's best interest upon his return. Madam Justice Martinson summarizes the policy consideration in *Beatty*,

> Not returning A would send the wrong message that, when a case is before the courts in another jurisdiction, it is acceptable to wrongfully retain a child in another country, even in the face of an undertaking to the court to return the child, so long as the child says that he or she does not want to return.[56]

However, obtaining the views of the child in a reasonable time frame is not always possible in *Convention* cases. In a recent British Columbia Supreme Court case, an 11 year old child's wish to stay in British Columbia, and not return to her left-behind father in El Salvador, became known during the case management conference.[57] The parties agreed to have a Views of the Child Report prepared, but the report was not released until 5 months later, resulting in the hearing being adjourned twice. Though the court held that the time delay would have a negative impact on a child's relationship with the left-behind parent, it ultimately concluded that, in this case, it was not a significant factor in the child's reasoning. Thus, the court exercised its discretion under Article 13 of the *Convention* and refused to return the child to El Salvador.

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[53] *Thomson*, *supra* note 19 at 553.
[54] *Beatty v. Schatz*, 2009 BCCA 310 [*Beatty*].
[55] *Ibid* at para 20.
[56] *Ibid* at para 58.
[57] *G.A.G.R.*, *supra* note 50.

Another interesting aspect of obtaining the child's view and the importance of timing can be seen in the Ontario Court of Appeal case, *A.M.R.I. v. K.E.R.*, 2011 ONCA 417. In that case, a 13 year old girl was visiting her father and aunt with her maternal grandmother in Toronto. After revealing that she suffered physical and psychological abuse from her mother in Mexico, the girl was granted refugee status and began living with her aunts in Toronto. Approximately 18 months later, the mother filed an application under the *Convention*, after which the girl was found to have been wrongfully retained in Ontario and the court ordered the return of the girl to Mexico. On appeal, though, the court ordered a new hearing based on the finding that the girl's views were not sought, nor was she represented by counsel. This case is unique in that it is rare that a child would be granted refugee status before there can be a hearing under the Hague *Convention*. It is also the first case of its kind to grant procedural protections such as notice, disclosure, and the right to representation to a refugee child whose return is being sought under the *Convention*.[58]

Conclusion

In summary, to protect children from the harmful effects of child abduction, the *Convention* requires the immediate return of a child wrongfully removed or retained from its habitual residence. Since the *Convention* does not define habitual residence, and the case law is clear that definitions from provincial legislation do not apply, British Columbia courts have developed a consistent approach to its definition. With emphasis on habitual residence being defined on a case-by-case basis, the courts tend to take a holistic view of the circumstances of the parents and the child before, during and after any move to a new habitual residence.

Article 3 of the *Convention* defines a removal or retention of a child from its habitual residence as wrongful when it is in breach of rights of custody or access, providing those rights were being exercised at the time of removal or retention. It is now well-established law in British Columbia that if a foreign court has an issue of child custody or access before it, then that foreign court holds the right of custody.[59] Moreover, a left-behind parent does not have a high threshold to meet to show that they were exercising rights of custody or access. However, the *Convention* is not meant to decide custody and access applications and any decision made on a *Convention* application is not to be taken as a determination on a custody issue.

Lastly, the *Convention* provides exceptions to the immediate return of a wrongfully removed or retained child, and this paper briefly spoke to four of them: the "Now Settled" exception, acquiescence, risk of physical or psychological harm, and the child's views. In deciding whether one of these defences applies, Canadian courts have been relatively clear that the person invoking them must meet a high threshold in order to outweigh the objectives of the *Convention*. For example, the "now settled" exception contemplates whether uprooting a child to return them would cause further harm, and the acquiescence defence requires clear and cogent evidence of unequivocal consent

[58] Cristin Schmitz, "Refugee child entitled to counsel in Hague application: New procedural protections, including right to counsel, recognized", *The Lawyer's Weekly* 31:7 (17 June 2011) (QL).
[59] *Fasiang*, *supra* note 21 at para 96-97.

or acquiescence.[60] Further, the law around the application of the *Convention* continues to evolve, as seen in *A.M.R.I.* where a 13 year old refugee child was granted procedural protections and a new *Convention* hearing.

In conclusion, British Columbia has taken an active role in fulfilling its obligations to, and furthering the objectives of, the *Convention*. Since adopting the *Convention* in 1983, a Central Authority has been established that oversees and implements British Columbia's obligations under the *Convention*. As the Central Authority, Ms. Penny Lipsack serves as a hub of communication internationally, nationally, provincially, and even at the local level with parents and other external agencies. So too, Canada's Special Committee and Network of judges work diligently to facilitate communication between judges, to develop judicial training material, and streamline processes and procedure for *Convention* cases. Thus, the British Columbia courts and Central Authority give effect to the objectives of the *Convention* through the careful application of its provisions.

For further information on International Child Abduction, the Government of Canada has published the booklet "International Child Abduction: A Guidebook for Left-Behind Parents" and a consent letter for children travelling abroad. Both publications can be accessed on the website for the Department of Foreign Affairs and International Trade Canada at www.international.gc.ca.

[60] *Katsigiannis*, *supra* note 46 at para 101.