



International Child Abductions & the Hague Convention

Presented by Cléa Amundsen and Jeremia Chow

Kitsilano Family Law



Goals for Today's Presentation

1. Learn how to identify Hague files
2. Understand how an application for a return of the child works through an overview of the Convention
3. Consider how Canadian courts will decide on Hague applications through an examination of recent case law



Overview of the Hague Convention

28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

- ❖ Number of Contracting Parties to this Convention: 101
- ❖ Ratified into Canadian law in 1983 → one of the first handful of signatory countries!
- ❖ Link to the list of member countries: <https://www.hcch.net/en/states/hcch-members>

- ❖ Applies to international cases, where children are abducted from one country to another
- ❖ Applies between countries who are signatories - both countries need to be signatories

Law in BC pursuant to section 80 of the FLA - not incorporated into FLA but states has force of law in BC



Family Law Act - Division 7 of Part 4

Applies to interprovincial cases, where children are abducted from one province to another

Also applies to international cases where the other country is not a signatory to the Hague Convention - section 80(6)

In cases where both the Hague Convention and FLA apply, the Hague Convention takes priority (see *Hewstan v. Hewstan*, 2001 BCSC 368)



What to do in non-Hague cases - Child in BC

File a Jurisdictional Response (Rule 18-2)

Apply under Division 7 Part 4 of the FLA for orders that :

- ❖ BC should not take jurisdiction or should decline jurisdiction
- ❖ The child is habitually resident in the other country/province
- ❖ To return the child to the home state/province

Consider as well if ancillary orders are necessary - for example police enforcement, production of passports and other travel documents, for the child to be given immediately to the left-behind parent



What to do in non-Hague cases - Child taken from BC

Consider applying for a return order, which could potentially be enforced in other state/province

Should contact counsel in the other country/province to see if the BC order will be enforceable, and, if so, how to enforce it

Consider whether ancillary orders could be necessary as well - particular for within Canada whether RCMP assist clauses could be helpful



How to use the Hague Convention

If the child is abducted from another country **to BC**

Make an application in BC for return of the child to his or her home state

If the child is abducted **from BC** to another country

Application must be made in that country for the return of the child to BC



Central Authority in BC

In any abduction case, you want to contact the Central Authority in BC, which is either Jane Connell or Jillian Stewart

The general email address is BCCentralAuthority@gov.bc.ca

Jane's contact information is Jane.Connell@gov.bc.ca, +1 (250) 356-8433

You can also look at their website:

<https://www2.gov.bc.ca/gov/content/life-events/divorce/international-child-abduction>



Article 1

Sets out **objectives** of Hague Convention

Is to be applied to secure the prompt and efficient return of children wrongfully removed to or retained in any contracting state

To ensure that rights of custody and access are effectively respected in contracting states



Article 3

Sets out situations in which children will be considered **wrongfully removed or retained**

Removal or retention is considered wrongful when it is in breach of custody which existed under the law of the state where the child was habituation resident at the time of the removal or retention

Does not have to be sole custody, may be joint

Rights of custody may be held by a “person, institution or other body” - which means that not only the parents but also court or other government agency can have “rights of custody” if there is a court application in progress

Do not need to have a court order establishing rights of custody, can have under statute or common law



Article 3

Means that do not need to have pre-existing order stating that a parent has custody

It would be enough, for example, if a parent is presumptively a guardian under the FLA

No need to get “chasing order” setting out custody rights after the fact

The custody rights do need to be “actually exercised” - but abducting parent cannot generally rely on his or her improper withholding of the child

Jane Connell or a BC lawyer can provide legal affidavit concerning the operation of the law in BC if there is any uncertainty



Articles 4 and 5

Hague Convention only applies to children under the age of 16 (Article 4)

Rights of custody are broadly defined - much more so than in domestic legislation (Article 5)



Article 12

Where the wrongful removal or retention has been established and an application for return has been started **within a year**, then the court must order the return of the child to his or her home state

After one year, the return is no longer mandatory - the court still needs to order the return but may refuse if it is shown that the child has “**settled in**” to the new environment

The test for “settled in” is on a balance of probabilities

However, it is very important to begin the application within a year - makes the return application must easier



Article 13

Contains some limited **exceptions** to the return

13(a) - the person seeking the return was **not exercising the rights of custody**

13(a) - the person seeking the return either **consented to or subsequently acquiesced in** the removal or retention

Also if **the child objects** to the return and has obtained an age and maturity where it is appropriate to consider his or her views



Article 13(b)

The most common exception that the abductor tries to claim

13(b) - there is a “grave risk” that the return would expose the child to physical or psychological harm that would place the child in “an intolerable situation”

Very high standard - for example not just that there is family violence but also that the home state cannot protect the child (for example with child protection laws)



Article 13

Onus is always on the abductor to prove

Often need expert evidence - for example regarding the views of the child or regarding child protection in the home state

Nothing to do with the best interests of the child - that is for the home state to determine

Even if the abductor shows that an exception is application, the return will not automatically be denied - the court just needs to take it into account

The thrust of the Hague Convention is that a return should be ordered in practically all cases



Article 16

Once the court receives notice of a wrongful removal or retention, then the court “shall not” decide on the merits of the rights of custody

Once the Hague Case is begun, then any previous actions are suspended - including any filed Notice of Family Claim, Application to Obtain an Order, any orders, ect.



Article 26

Left behind parent can seek actual costs - including all legal costs and any associated costs like airfare or hotel costs



Supreme Court vs. Provincial Court

Both have special procedures - highly recommend that you read these carefully if you have a suspected Hague case

Supreme Court Practice Direction PDF 9:

[https://www.bccourts.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](https://www.bccourts.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)

Provincial Court Practice Direction Fam 04:

<https://www.provincialcourt.bc.ca/downloads/Practice%20Directions/FAM%2004%20Procedural%20Protocol%20-%20Return%20Applications%20under%20the%201980%20Hague%20Convention.pdf>



Roberto Cavalli - age 8

Francine and Giovanni met in Canada in 2008. They immediately fell madly in love and got married at a small ceremony in Cranbrook. In 2010 Giovanni got a job offer to make Vespas in Milan, and the family decided to move there.

Their son, Roberto, was born two years later in 2012. Francine was homesick for BC, so she and Roberto came often, usually without Giovanni.

On June 15, 2019, Giovanni agreed for Francine to take Roberto to BC for the summer holidays. They were due to return to Italy on August 15.

On August 13, Francine informed Giovanni that she would be staying in BC with Roberto. The parents have tried negotiations, but these failed. Francine filed a Notice of Family Claim seeking all the usual orders on March 15, and Giovanni was served on May 24.



Covid-19

We are going to pretend that we are in an alternate universe where there is no pandemic.

However, even in the present circumstances, Hague cases are presumptively considered urgent, so you can (and should) still bring these cases if they come up, especially if the one year deadline is approaching.



Identifying Hague Cases

Is there a question of whether the child should be in Canada or another country?

If yes, is that other country a contracting state under the Hague Convention?

If yes, the Hague Convention may apply

- ❖ Is the child in BC with the agreement of both parents
- ❖ Are there orders in another country
- ❖ Are there safety concerns
- ❖ How old is the child
- ❖ What is the history of the child's living arrangements - where, with which parent
- ❖ What nationality does the child have



What to do if you have a Hague Case - Child in BC

1. Contact the Central Authority (Jane Connell)
2. Jane will file an Article 16 Notice (ie send a letter to the court) - this will suspend any ongoing actions, including any previously filed Notice of Family Claim or court orders
3. File your Petition (Rule 3-1(2.2)(b)) or Application to Obtain an Order
4. It may be necessary to seek without notice orders for non-removal, passport hold, and substitutional service - especially if concerned that the abductor may leave BC



What to do if you have a Hague Case - child in BC

5. Matters will then proceed rapidly - exempt from JCC or First Appearance, FCC, and Parenting After Separation
6. Hearing before judge to set timelines for exchange of additional documents - in SC held with affidavits only, in PC can also be done with affidavits
7. Make sure that seek not only order to return but also any other orders to give effect to the return - police assist clauses, how to deal with passports, who is to return with the child, costs



What you need to prove to have the child returned

1. That your client has “rights of custody” (Articles 3 and 5)
2. That the child has been wrongfully retained or removed (Article 3)
3. If it has been less than one year, the court “shall” order the return (Article 12) or
If it has been less than a year, prove that the child has not “settled into” the new environment
4. That none of the exception in Article 13 apply



What to prove to have the child remain in BC

1. That the other parent does not have rights of custody (Articles 3 and 5)
2. That the removal or retention is not wrongful (Article 3)
3. If it has been more than one year, that the child has settled into life in BC (Article 12)
4. That one or more of the exceptions in Article 13 applies



Roberta Cavalli - age 8

Francine and Giovanni met in Canada in 2008. They immediately fell madly in love and got married at a small ceremony in Cranbrook. Although Giovanni is from Italy, the family settled very happily in BC

Their daughter, Roberta, was born two years later in 2012. Giovanni was homesick for Italy, so he and Roberta went often, usually without Francine.

On June 15, 2019, Francine agreed for Giovanni to take Roberta to Italy for the summer holidays. They were due to return to Italy on August 15.

On August 13, Giovanni informed Francine that he would be staying in Italy with Roberta. The parents have tried negotiations, but these failed. Giovanni has filed in Italy and Francine has been served.



What to do if you have a Hague Case - child abducted from BC

1. Contact the Central Authority
2. Consider giving undertakings to facilitate return



Roberta Cavalli - age 8

Francine and Giovanni met in Canada in 2008. They immediately fell madly in love and got married at a small ceremony in Cranbrook. Although Giovanni is from Italy, the family settled very happily in BC

Their daughter, Roberta, was born two years later in 2012. Giovanni was homesick for Italy, so he and Roberta went often, usually without Francine.

Giovanni wants to take Roberta to Italy for the summer holidays. Francine is afraid that he may not return her to BC.



What to do if there is a concern about a future abduction

If, by chance, you get contacted by a parent who is concerned that the other parent is going to keep the child in another country, but the child is still in BC, put protections in place before the child leaves

- ❖ Security to be held in trust
- ❖ Clear custody order
- ❖ Clearly time limited Consent to Travel
- ❖ Clear parenting orders already in place
- ❖ Order of habitual residence



Canadian Case Law

Because the Convention is an international treaty, you can cite cases from other Canadian jurisdictions and international cases as well

Relatively few cases. Only two SCC:

1. *Thomson v. Thomson*, [1994] 3 S.C.R. 551;
2. *Office of the Children's Lawyer v. Balev*, 2018 SCC 16 (CanLII), [2018] 1 SCR 398 → which is now the leading authority

57 cases citing *Balev*, 40 are Hague cases, 12 of those are appellate cases (but none from BC), 5 BCSC, and no BCPC



***Thomson v. Thomson*, [1994] 3 S.C.R. 551**

First SCC case on a Hague application.

Parties married in Scotland. Not long after, they separated and both sought custody of their 7-month child. The Scottish court ordered the mother interim custody and the father interim access, and ordered that the child remain in Scotland until a final court order. A few days later, the mother took the child with her to Manitoba to be with her parents and decided not to return. On the same day, the father obtained an ex parte custody order. He made a Hague application for a return of the child.



***Thomson v. Thomson*, [1994] 3 S.C.R. 551**

SCC held that Scottish court had rights of custody as there was an application regarding custody before it at the time of removal and the Scottish court therefore had “the right to determine the child’s place of residence” - return ordered on that basis

Also discussed grave risk of hard exception (Art 13. (b)) → harm has to be extreme



Office of the Children's Lawyer v. Balev, 2018 SCC 16 (CanLII), [2018] 1 SCR 398

The case represents marks a change to how courts determine “habitual residence” of a child.

Parties were married in Ontario and then moved to Germany. Children born in Germany. Parties separated. Children were struggling in school, so father gave permission to allow mother to bring children back to Canada for one school year. He purported to revoke consent and commenced proceedings for a return of the children to Germany through the Hague Convention.

By the time the SCC heard the case, the children had been ordered to returned to Germany and German courts had ordered the mother to have sole custody, and she had moved back to Canada with the children



***Balev*: hybrid approach**

Hybrid approach - court must look at all relevant considerations

- ❖ Combines both parental intention approach (based on intention of parents) and child-centred (child's acclimatization)
- ❖ Parental intentions and any agreements the parents might have made as well as the child's links to and circumstances in both countries
- ❖ Includes considerations of the duration, regularity, conditions, and reasons for the child's stay in a particular country as well as the child's nationality
- ❖ No single determinative factor and considerations vary depending on the age of the child

However, did not change law that habitual residence is determined immediately prior to the wrongful removal or retention - subsequent links are only relevant under the "settled in" exception



Ludwig v. Ludwig, 2019 ONCA 680

Case lays out a two-stage analysis.

Stage One: Habitual Residence

- 1) On what date was the child wrongfully removed or retained?
- 2) Immediately before the date of the alleged wrongful removal or retention, which jurisdiction was the child habitually resident?



Stage 1: Determining Habitual Residence

- a) Determine the focal point of the child's life, namely the family and social environment in which its life has developed, immediately prior to the removal or retention.
- b) To determine the focal point of the child's life, the court must consider the following three kinds of links and circumstances:
 - i) The child's links to and circumstances in country A;
 - ii) The circumstances of the child's move from country A to country B; and
 - iii) The child's links to and circumstances in country B.
- c) In assessing these three kinds of links and circumstances, the court should consider the entirety of the circumstances, including, but not restricted to, the following factors:
 - i) The child's nationality;
 - ii) The duration, regularity, conditions and reasons for the child's stay in the country the child is presently in; and
 - iii) The circumstances of the child's parents, including parental intention.



End of Stage One: Two Outcomes

- 1) If the the child was habitually resident in the country in which the alleged abductor took the child, then the Hague Convention does not apply and the court should dismiss the application.
- 2) If the the child was habitually resident in the country of the applicant, then the Hague Convention applies and the court should proceed to stage two of the analysis.



Stage Two: Exceptions

The court shall order the return of the children unless it determines that one of the exceptions in Art. 13 applies.

- 1) The parent seeking return was not exercising custody or consented to the removal or retention (Article 13(a));
- 2) There is grave risk that return would expose the child to physical or psychological harm or place the child in an intolerable situation (Article 13(b));
- 3) The child of sufficient age and maturity objects to being returned (Article 13(2));
- 4) The return of the child would not be permitted by fundamental human rights and fundamental freedoms of the requested state (Article 20); or
- 5) The application was brought one year or more from the date of wrongful removal or retention, and the judge determines the child is settled in the new environment (Article 12).



Contact Us

Cléa Amundsen: camundsen@kitsfamilylaw.com

Jeri Chow: jchow@kitsfamilylaw.com

Call our office: 604-731-5676