



December 23, 2011

Via email: mriendea@justice.gc.ca

Marie Riendeau
Counsel, Justice Canada
International Private Law Section
350 Albert Street
Ottawa, ON K1A 0H8

Dear Ms. Riendeau,

Re: 1980 and 1996 Hague Conventions

I am writing on behalf of Canadian Bar Association's National Family Law Section (CBA Section) in response to your request for comments for your reference in upcoming Special Commission hearings on the 1980 and 1996 Hague Conventions. We appreciate the opportunity to provide the experience of family practitioners to inform your participation in this important work.

You asked for comments on two key issues:

1. Domestic violence in abduction cases

In cases falling under the 1980 *Convention on the Civil Aspects of International Child Abduction*, the basic facts are generally clear. Once there is a removal of the child in contravention of rights of custody, the defence often raised is one of consent. Where there is no claim that consent was provided, the exceptions set out in article 13 are considered. A common claim under article 13(b) is that the removing parent, or the child, or both, have been victims of domestic violence from the left-behind parent, and that violence results in a "grave risk of physical or psychological harm" to the child. If grave risk is established, the child need not be ordered to be returned, even if the *prima facie* conditions are met.

One of the challenges is identifying when and how a claim of domestic violence constitutes a "grave risk" as required by the Convention. Case law establishes a high threshold in the application of this article.

As practitioners in this area, we face the following challenges with the application of this article in the area of domestic violence:

- Evidence is a substantial problem. Practices across the country differ significantly with respect to the use of independent experts or assessments of children to speak to the possibility of grave risk.

- The summary nature of the proceedings does not allow for assessments of credibility, where such assessments are necessary, as independent or objective evidence often does not exist.
- The summary nature of proceedings requires affidavit evidence, but affidavit evidence is problematic with this type of claim. As the claims are generally denied, competing affidavits are often before the court without any ability to assess credibility.
- The best evidence is still in the jurisdiction of habitual residence. This would include independent evidence and witnesses aside from the parties themselves.
- Due to the lack of available evidence, access to government records such as child welfare, medical-dental records and police records would often be useful, but is generally hard to obtain. Access to this information could be expedited. Where appropriate, privacy legislation must also be addressed to facilitate access to useful independent evidence.
- The level of interaction with the other jurisdiction varies – including judicial conferencing and the application of article 14.
- Obligations on the left-behind parent to provide systemic evidence on the status of legal protection in that jurisdiction can be onerous if the central authority is not actively engaged.
- Role and involvement of counsel of the central authority across Canada varies.
- Child representation is engaged in some areas, but not in others.
- A lack of confidence in other contracting states' ability and infrastructure to address domestic violence issues may be an unspoken concern, but it is a crucial consideration in this process.

While practices differ across Canada, they differ even more dramatically in interactions with other countries. We support efforts to identify tools that would assist in the consistent application of article 13(b) and the development of “best practice” standards.

Although your inquiry was specifically about domestic violence, we note that very similar challenges are present in assessing whether a child objects to the return and has sufficient maturity that their views should be taken into consideration, also under article 13(b). We support further work in this regard as well.

2. Relevance of the 1980 Convention in mobility cases

CBA Section members observe that the 1980 Convention is relevant when issues of international mobility with children arise.

The question of whether a country is a signatory to that Convention impacts our courts' decision-making on mobility. The fact that the destination is a contracting state to the Convention provides some comfort that, if a child is kept in a country against an existing order, there are tools to address the problem.

However, tools to enforce access rights are very limited, once consent for the relocation is provided by the parent or authorized by the court. After a consensual relocation or retention, the use of the Convention to enforce rights of access alone is unworkable. The Convention is designed to deal effectively with abduction in contravention of access rights, but not to enforce or rectify a failure to provide access after a consensual removal or relocation.

The CBA Section suggests that the 1996 Convention may be a useful tool to address these situations. We feel that the successful implementation of that Convention in Canada will require adequate resourcing to the central authorities, guides to best practices, and good judicial education. These mechanisms are developing for the 1980 Convention and will be needed for the successful addition of the 1996 Convention in Canada as well.

Other than for abductions, the lack of enforceability of orders that are granted creates ongoing problems. The courts creatively use mirror orders or undertakings to accomplish as much as they can to provide certainty for the parties. However, mirror orders and undertakings rely substantially on the cooperation of jurisdictions, efforts of the parties, and the parties' good faith and consent. Even with these developments, more tools to enforce appropriate orders across borders would be valuable.

We hope these comments are helpful and look forward to the opportunity to have further dialogue with Justice Canada on these issues, and on the 1996 Convention in particular.

Yours truly,

(original signed by Gaylene Schellenberg for Kelly Jordan)

Kelly Jordan
Chair, National Family Law Section