THE HON. JUSTICE DONNA MARTINSON (RETIRED), BACKGROUNDER, CHILD PARTICIPATION AND CROSS BORDER PARENTAL CHILD ABDUCTION

2016

I. SUMMARY

Specific child rights issues arise for children in cases of cross border parental child abduction. However, there are different legislative frameworks that apply, depending on the place to which or from which a child is alleged to be wrongfully taken, or withheld, and on the age of the child. Canada is a signatory to the 1980 *Hague Convention on International Child Abduction* (the Hague Convention). The Hague Convention is specifically incorporated into provincial and territorial legislation. Therefore, if a child is taken to one of the many countries which are also signatories, and if the child is under 16 years of age, that Convention will apply. If another country is not a signatory, or the child is 16 or over, it will not apply. The Hague Convention does not apply to allegations of parental child abduction within Canada so domestic provincial territorial legislation will govern. This section focuses on children's participatory rights in these cases.

A. Hague Convention – Article 13 Objection

The Hague Convention itself states that a judge may refuse to order a return of the child if the court finds that "the child objects to being returned and has attained an age and degree of maturity which at which it is appropriate to take account of its views." (Article 13). The interpretation of that article is informed by children's broader participation rights under the CRC, which include both the right to be heard and to be taken seriously. Canadian appellate courts have cited, directly or indirectly, the observation by the English House of Lords (now the UK Supreme Court) in ***Re M***, an Article 13 objection case, that, "[t]hese days, and especially in light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views.": See ***Beatty v. Schatz***, 2009 BCCA 310, ***RM v. JS,*** 2013 ABCA 441, and ***Garcia Perez v. Polet***, 2014 MBCA 82.

The Ontario Court of Appeal in ***A.M.R.I, v. K.E.R.,*** 2011 ONCA 417 at para. 82, has said, in the context of a child who was a convention refugee, that the "jurisprudence of the Supreme Court of Canada consistently holds that the values reflected in international human rights law, and specifically those in the CRC, may help inform the contextual approach to statutory interpretation..". The courts in ***Beatty v. Schatz, RM v. JS,*** and ***Garcia Perez v. Polet*** have also followed the view of the UK court in ***Re M*** that taking account "does not mean that those views are always determinative, or even presumptively so." ([2008] A All ER 1157 at para. 46). See ***Beatty v. Schatz***, 2009 BCCA 310, ***RM v. JS,*** 2013 ABCA 441, and ***Garcia Perez v. Polet***, 2014 MBCA 82.

The issue of how a court determines whether a child is sufficiently old and mature arises. The Alberta Court of Appeal in ***RM v. JS,*** found, when dealing with a 10 year old child, that the issues that arise are complex and that the judge needed expert evidence.

This is a determination which should be made on a case by case basis. Many children will not have access to such expert evidence, and requiring them present it as a pre-requisite to participation could in effect deny children, and especially vulnerable children, the right to participate. Requiring expert evidence which is inaccessible would not be consistent with the expansive approach to participator rights found in the CRC. All children under the age of 16 have a right to use Article 13.

Courts have been more likely to conclude that a child over ten has the necessary capacity. See ***RM v.JS,*** where the child was 10, and ***Garcia Perez v. Polet*** where the child was 8***.*** There have, though, been a number of cases where children as young as 7 and 8 have been found to be sufficiently mature to have their views taken into account (***C(MLL) c. R(JLR),*** Droite de la famille – 2875, [1997] AQ No 3935, [1997] JC no 3935 (QCA), at paras. 69-70**;** ***Re B (Abduction: views of the child)*****,** [1983] 3 FCR 260 (Fam Div); and ***Borisovs v. Kubiles*****,** [2013] OJ No 863, at para. 50.

B. <u>Participation on All Cross-Border Child Abduction Issues</u>

The only reference in the Hague Convention to children's ability to participate is found in Article 13. However, children, in all judicial (and administrative) proceedings, have broad participatory rights under the CRC in <u>all</u> matters affecting them, rights which involve being heard and being taken seriously. The kinds of issues that arise in child abduction cases in which children may participate are illustrated by providing an overview of the issues to be decided in a Hague Convention application in the place to which a child has been taken for the return of the child to the place from which the child has been taken. The ultimate decision – whether the child should be returned, as well as decisions on the issues that must be decided in reaching the ultimate decision, unquestionably affect the child and therefore engage Article 12 of the CRC. They include: where the child habitually resided before the removal or retention; whether the child is, after a year, settled in the child's new environment; whether there has been consent or acquiescence; and whether there is a grave risk that a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Courts are now considering hearing from children on all of these issues: see for example ***In the Matter of L.C.*** 2014 UKSC 1**,** in which the UK Supreme Court, in a Hague proceeding, concluded that there is a presumption that a child will be heard during a Hague Convention proceedings unless this appears inappropriate. The court joined a child as a party and heard from the child on the issue of habitual residence and the child's state of mind. Earlier, that court considered participation relevant to whether a child is settled in his or her new environment: ***In re M, [***2007] UKHL 55.

The same kinds of issues, though they may be framed differently, apply to parental child abductions within Canada. For example, when a court in one province or territory is considering whether to enforce a custody order in another province or territory, that court will consider questions such as whether the child has a real and substantial

connection with the jurisdiction which made the original order, and whether the child would suffer serious harm if returned to the custodial person named in the order.

C. Nature of the Participation

There is a particular need, in all cross-border child abduction cases, to consider both independent legal representation for the child, and whether the child should be added as a party. The issues involved are particularly complex. As the Ontario Court of Appeal has compelling put it, an "order of return under the Hague Convention has a profound and often searing impact on the affected child.": ***A.M.R.I, v. K.E.R.*****,** at para. 120. That court also concluded that the child, who was not provided notice, not added as a party and did not otherwise participate, was denied procedural fairness and had her s. 7 of the Charter rights infringed. The Alberta Court of Appeal implicitly endorsed the hearing judge's decision to appoint counsel for the child for the purposes of a Hague return application in a Hague Article 13 child objection case: ***RM v. JS.***

Counsel for a child can play a very important role in not only giving the child a voice, but in ensuring the proper evidentiary foundation is provided, in testing the evidence provided by others, and in assisting the judge in determining the legal principles that apply, and more generally, the way in which the child's voice is considered. The court in ***RM v. JS*** concluded that it was not appropriate for counsel for the child to in essence give evidence by conveying the child's view through submissions.

D. Procedural Issues - Timely Decision making

In child abduction cases it is particularly important to have decisions made as soon as is reasonably possible, and to ensure that in the process, the child's views are considered effectively. There is a danger that children could be required to participate too often when there are court proceedings taking place in different jurisdictions. Provincial and territorial legislation may have provisions requiring timely decisions. The CRC speaks about the best interests of children encompassing substantive, interpretative and procedural rights. Among the procedural rights are timely making of decisions.

Canada has a Network of Judges, called "Contact" judges, with representatives from Superior and Provincial Courts, whose purpose is to facilitate the timely resolution of child abduction cases. The Network has developed Protocols for the timely and effective handling of Hague Convention cases, which by their terms, can be adapted to cases within Canada. The Network has also developed Judicial Communication Guidelines, which allow Canadian judges to communicate with judges in other countries or in other parts of Canada, to facilitate the timely and effective resolution of child abduction cases.

II – THE LAW

A. General

1. The CRC

In addition to the broad participatory rights discussed elsewhere in this Toolkit, the CRC, in Article 35, states the state parties shall take all appropriate national, bilateral and multilateral measure to prevent the abduction of children for any purpose or in any form.

2. The Hague Convention

a. Legislative Framework
- Only applies to Contracting States (signatory states).
- Only applies to children under the age of 16. (Article 4)
- Does not apply to interprovincial/territorial child abduction.
- Each state must establish a Central Authority to promote cooperation among states. (Articles 6 and 7)

b. Purpose, Scope and Overall Approach of the *Hague Convention*
- A primary objectives to secure the prompt return of children wrongfully removed or retained children to the place of their habitual residence. (Article 1)
- The removal or retention of a child is considered wrongful where
    - It is in breach of rights of custody under the law of the place in which the child was habitually resident immediately before the removal or retention (Article 3(a)) and
    - At the time of removal or retention those rights were actually exercised… (Article 3(b)).
- The merits of custody or access should be decided by the child's state of habitual residence, except in extraordinary circumstances. Therefore the judicial and administrative authorities of the place to which the child has been removed or retained, shall not decide the merits of rights of custody until it has been determined that the child is not bel returned under the Convention…(Article 16)

- Therefore Judges in Canada cannot deal with the merits of custody or access until the *Hague Convention* return application is denied or a reasonable time has lapsed after notice of wrongful removal/retention without a return application being filed.

- Only rights of custody (as defined in the *Hague Convention*), not rights of access, can support a return order (although Contracting States and Central Authorities must cooperate to promote access rights). A custody order is not required.

- Chasing orders (custody orders made after a child has been removed or retained) do not create rights of custody or make retentions/removals wrongful. Such orders may complicate obtaining the child's return from a foreign state. (See for example *Thomson v. Thomson, [*1994] 3 S.C.R. 551.

- Timing is important. Mandatory return of the child is required (subject to the exceptions below): (Article 12)

    - if less than one year has passed from wrongful removal or retention to the date of the commencement of the proceedings.

    - if proceedings are commenced a year or more from wrongful removal or retention, unless it is demonstrated that the child is now settled in his or her new environment.

- Exceptions to mandatory return:

    - Not exercising rights of custody. (Article 13(a))

    - Consent or acquiescence. (Article 13(a))

    - Grave risk that the child's return would expose her or him to physical or psychological harm or otherwise place the child in an intolerable situation. (Article 13(b))

    - The child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views. (Article 13)

    - The return would not be permitted by the fundamental principles of the Requested State (state to which the child has been removed or is being retained) relating to the protection of human rights and fundamental freedoms (a provision that is seldom applied). (Article 20)

- Judges must deal with return applications expeditiously; parties can request reasons for delay from the judge if the decision is not reached within six weeks of the commencement of the proceedings. (Article 11).

3. Abduction within Canada – Enforcement Under Child Custody Enforcement Legislation

Provinces and territories generally have legislation that can be used to enforce extra-provincial custody and access orders. Most pieces of legislation have common objectives, including:

- Recognizing that it is best for children to avoid the concurrent exercise of jurisdiction by court in more than one province of territory;
- To discourage the abduction of children rather than determining custody in the place to which the child has the closest attachment; and
- To provide for the recognition and enforcement of custody and access orders made outside the jurisdiction.

Generally, the legislation describes when the court in the place to which a child has been taken/kept, can make a custody order notwithstanding the order in the place from which the child was taken. They include:

- The child, at the time of the application, does not have a real and substantial connection with the jurisdiction that made the original order and has that connection with the provincial/territory hearing the case;
- All of the people are habitually resident in the province or territory; or
- The child would suffer serious harm if returned to the custodial person name in the order.

B. <u>Case Highlights</u> (in alphabetical order)

A.M.R.I. v. K.E.R. (Ontario Court of Appeal)

In this case the Ontario Court of Appeal dealt with both a child's objection to a return and the child's right to participate in the ***Hague Convention*** return hearing, in a situation where the child had been declared a Convention refugee. As the court put it, "…this case is ultimately about the rights of a refugee child to be heard and to participate in a *Hague Convention* Application.": para. 2. The court found that in the context of a child refugee, the views of the child gain greater importance; the child's s. 7 of the Charter rights were engaged. A conclusion was that when a child is a convention refugee, a rebuttable presumption arises that there is a risk of persecution on return of the child to his or her country of habitual residence; para 74.

At the time of the return hearing the child was almost 14 years old. She originally had lived with her mother in Mexico. A Mexican court order granted custody to the mother, with access to the father. She visited her father and paternal aunt in Toronto, accompanied by her maternal grandmother and an uncle. While in Toronto the child, supported by her maternal grandmother, alleged her mother treated her in an abusive manner. She did not want to return to Mexico. As a result, she applied successfully to be declared a Convention refugee. As is usual, her mother was not given notice of those proceedings and did not participate in them.

Her mother then applied in Ontario under the ***Hague Convention*** for an order returning the child to Mexico, denying the abuse allegations. The child was not given notice of the return hearing, her views and preferences were not sought and she was not represented by counsel. The Court of Appeal said that the views of a child gain greater weight when the child is a Convention refugee. In these circumstances the court had "…no hesitation in concluding that the child was denied procedural fairness and that her s. 7 *Charter* rights were infringed.": para 122. For these and other reasons, the decision to return was set aside and a new hearing directed.

The court concluded this discussion by saying that: (para 111)

> …Given the child's age, the nature of her objection, her status as a Convention refugee, the length of time that she had been in Toronto, and the absence of any meaningful current information regarding her actual circumstances in Toronto at the date of the Hearing, her views concerning a return to their mother's care in Mexico were a proper and necessary consideration.

On the question of the nature of the process, spoke about whether there should be an oral hearing, saying that when serious issues of credibility are involved, an oral hearing may be necessary in spite of the importance have having expeditious processes, because expediency will never trump fundamental human rights:

> [124] Given the strong commitment under the Hague Convention to expeditious proceedings and the need for the prompt return of an abducted child, this court has repeatedly recognized that the receipt of viva voce evidence on a Hague application should occur only in exceptional circumstances…
>
> [125] Where, however, serious issues of credibility are involved, fundamental justice requires that those issues be determined on the basis of an oral hearing: Singh, at para. 59. This applies with equal force to the determination of serious credibility issues in Hague applications involving refugee children. <u>Expediency will never trump fundamental human rights</u>. Emphasis added.

Beatty v. Schatz 2009 BCCA 310.

The return hearing judge applied Article 13 of the 1980 *Hague Convention* and the British Columbia Court of Appeal upheld that decision. The mother, Ms. Schatz, applied for the return of an 11 year old boy to Ireland. He has been in British Columbia with his father, Mr. Schatz for several months. Mr. Schatz opposed the return saying that Alex was adamant that he did not want to return and is of an age and has the maturity to make that decision. The parents shared joint custody in Ireland, and Mr. Schatz's application for sole custody so that so that the boy could live with him in Canada was before the Irish Courts. At the same time as he made that application he asked for the permission of the Irish Court to bring the boy to Canada for a one month vacation. He gave a sworn undertaking to the Irish Court to return him. He did not do so and instead enrolled the boy in school. It was then that Alex began to say that he did not want to return to Ireland. Mr. Schatz took the view throughout the proceedings that it was

entirely a decision between boy and his mother; Mr. Schatz would not even speak to Ms. Schatz directly. Rather, he encouraged Alex to speak to his mother himself.

The Court directed that a *Views of the Child Report* be prepared by a psychologist, in spite of the objection by counsel for the mother. The psychologist concluded that the boy, was of an age and had the degree of maturity required to take his views into account. He reported that the boy wanted to stay in British Columbia. The Court agreed that his views should be taken into account but ultimately concluded he should be returned to Ireland. The hearing judge applied the test found in Re M., (below)

The Court of Appeal confirmed the decision to return the child, notwithstanding the child's wishes, saying:

> [20] The trial judge correctly interpreted Article 13 as giving her a discretion. She regarded A's wishes as one factor, certainly an important factor, to be considered amongst others, including the importance of ensuring that children are not wrongfully removed from their home jurisdictions or wrongfully retained elsewhere. Indeed, the objects of the Convention as stated in Article 2 are to secure the prompt return of such children and to ensure that rights of custody and access under the laws of contracting states are "effectively respected" in the others. These objectives were stressed by the Supreme Court of Canada in the seminal case of *Thomson v. Thomson*, [1994] 3 S.C.R. 551, where La Forest J for the majority stated:
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> > The preamble ... states the underlying goal that document is intended to serve: "[T]he interests of children are of paramount importance in matters relating to their custody." In view of [the lower court's] remarks on this matter, however, I should immediately point out that this should not be interpreted as giving a court seized with the issue of whether a child should be returned to the jurisdiction to consider the best interests of the child in the manner the court would do at a custody hearing. This part of the preamble speaks of the "interests of children" generally, not the interest of the particular child before the court. This view gains support from Article 16, which states that the courts of the requested state shall not decide on the merits of custody until they have determined that a child is not to be sent back under the Convention. I would also draw attention to the fact that the preamble goes on to indicate the manner in which its goal is to be advanced under the Convention by saying:
> >
> > > "Desiring to protect 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 to secure for rights of access."
>
> The foregoing is entirely consistent with the objects of the Convention as set out in its first Article. Article 1 sets out two objects: (a) securing the return of children wrongfully removed to or retained in any contracting state; and (b) ensuring that the rights of custody and access under the law of one contracting state are effectively respected in other contracting states. [at page 14]

[21] In this case there was evidence to support the chambers judge's findings and inferences. She gave serious consideration to A's expressed wishes, but concluded that those wishes had been influenced by A's father and that the onus on Mr. Schatz to justify the continued retention of A in this jurisdiction was not met. I agree with counsel for Ms. Beatty that Mr. Schatz in addition to breaching his undertaking to the Irish court has not recognized his responsibility as a parent to act in A's interests, or realized the effect his attitude is having on A. Of course A loves his father and has enjoyed his time in Canada, where (until recently) he has been largely shielded from the consuming conflict between his parents. It is obvious that it would be in A's interests for both parents to overcome their hostility towards each other and not to use A as a pawn in their conflict. If this lesson can be learned, perhaps some good will come of this unfortunate episode.

Re D (A Child) (Abduction: Rights of Custody), [2006] UKHL 51 (at paras. 58-60).

The English House of Lords has considered a child's right to be heard in Hague matters and how this may occur:

> [58] ... the principle is in my view of universal application and consistent with our international obligations under article 12 of the United Nations Convention on the Rights of the Child. It applies, not only when a "defence" under article 13 has been raised, but also in any case in which the court is being asked to apply article 12 and direct the summary return of the child - in effect in every Hague Convention case. It erects a presumption that the child will be heard unless this appears inappropriate...
>
> [59] It follows that children should be heard far more frequently in Hague Convention cases than has been the practice hitherto. The only question is how this should be done. It is plainly not good enough to say that the abducting parent, with whom the child is living, can present the child's views to the court. If those views coincide with the views of the abducting parent, the court will either assume that they are not authentically the child's own or give them very little independent weight. There has to be some means of conveying them to the court independently of the abducting parent.

> [60] There are three possible ways of doing this. They range from full scale legal representation of the child, through the report of an independent CAFCASS officer or other professional, to a face to face interview with the judge....
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> But 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.

G.A.G.R. v T.D.W., 2013 BCSC 586:

The B.C. Supreme Court, after citing Article 13 of the ***Hague Convention*****,** discussed the importance of Article 12 of the UNCRC to Hague proceedings:

> [47] The concept of giving effect, where appropriate, to the views of a child is consistent with the provisions of the United Nations *Convention on the Rights of the Child* to which Canada is a signatory. Article 12 of that convention provides in part: [Article 12(1) is set out.]
>
> [48] That convention has not been implemented by statute in Canada but is has been ratified and the provincial and federal governments presume that domestic family law respect the rights and values set out in the convention: *B.J.G. v. D.L.G.* 2010 YKSC 44 at para. 5*. …*

The Court described the following approach for the exercise of discretion under Article 13 in relation to taking a child's views into account:

a) While courts are increasingly encouraged to take account of the views of children, that does not mean that their views are determinative or even presumptively so;

b) The question as to whether the child has reached an age and degree of maturity where it is appropriate to take her views into account must be determined based on all of the evidence. The relevant evidence will include the nature, strength and reasons for the child's objection.

c) A child's views should only be regarded if they are authentically her own. If the views have been influenced by someone else, or are based solely on a desire to stay with the abducting parent, then they should be given little weight.

d) The exercise of discretion may take into account the child's welfare.

e) The policy considerations underlying the *Convention* are an important factor in the exercise of discretion.

f) The older the child, the more weight her objections are likely to carry, however, there is no minimum age at which the objections can be taken into account.

g) A child's views can prevail even when the circumstances are not exceptional.

Re M. English House of Lords, [2008] 1 All ER 1157 at para 46:

> In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion come into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances. (emphasis added)

Note: The Alberta Court of Appeal cited this paragraph with approval in ***RM v. JS,*** 2013 ABCA 441 at para. 33. The British Columbia Court of Appeal upheld the hearing judge's decision and referred, at para 14, to the hearing judge's adoption of the paragraph: ***Beatty v. Schatz*****,** 2009 BCCA 310.

Garcia Perez v Polet**,** 2014 MBCA 82

In this Hague Convention case the Manitoba Court of Appeal upheld the order of the return application hearing judge that the eight year old child be returned to her habitual residence. The hearing judge considered Article 12 of the CRC. The Court of Appeal referred to the Alberta decision in ***RM v. JS*****:**

> Child's Wishes
>
> [29] Children should not be placed in the position of choosing between parents unless they have "attained an age and degree of maturity at which it is appropriate to take account of its views" (Art. 13(b) of the Hague Convention). Indeed, to do so might be extremely unsettling, or damaging to a young child. The child I this case is eight years old. The court canvasses the views of the child and determined that neither Hague Convention case law, not the protocols of Family Conciliation Services, nor Art. 12 of the United Nations Human Rights Office of the Commissioner for Human Rights, *Convention on the Rights of the Child…* required her to canvass the views of a child as young as eight. The cases and protocols relied on by the mother all deal with children over ten years of age. The case of *R.M. v. J.S.,* dealt with a ten-year old child. In finding that

there was insufficient evidence of the child's maturity, the court comments (at para. 25:

> …
>
> It would seem to me that, if one were to even consider the views of a child who was as young as age ten in the context of an Article 13 argument, the level of maturity would have to be quite extraordinary, …

RM v. JS.- 2013 ABCA 441

The issue of the kind of evidence required for an Article 13 defence was squarely before this Alberta Court of Appeal. Counsel was appointed on behalf of the ten year old child at the initial return hearing stage. That counsel, following a long established practice of the courts in Alberta, presented the views of the child and the child's position through the submissions of counsel. The court concluded that on the issues required to be decided the submissions of the lawyer did not amount to useful evidence, while emphasizing that the court made no criticism of counsel for the child.

It provided several reasons for this conclusion. One was the complexity of the matter, which it said requires some non-legal expertise which counsel did not have: para. 25.

> ...Determining the level of maturity of a child, particularly one who had recently turned 10 years old, is a difficult matter calling for some expertise…

And further on the appeal court said that the judge "needed the opinion of a qualified expert:": para. 26. The appeal court referred to an article by Alfred Mamo and Joanna Harris in which they state that "evidence about the child's wishes and view should be put before the court by a social worker or other child care professional, who has interviewed the child…" (para. 26)

Another reason was that counsel's evidence on maturity was presented through submissions; counsel cannot give evidence without forsaking his or her position as counsel because of the inability of the other side to cross-examine. Counsel cannot express the child's views and preferences without the express consent of the other parties. Yet another problem identified was the court's inability to evaluate the basis upon which the child's seeming opinion about his preference for staying in Canada rested. The child's perspective should be weighed not only in light of the apparent maturity of the child, but also upon what the child actually knows or understands about the alternatives and also upon what other factors may have influenced the child's think, a matter an expert would look into.

The Court also concluded that the enquiry is complex and referred with approval to comments of the Ontario Court of Justice. In the Ontario case, Justice Glenn discussed the level of maturity that would be required and suggested some "earmarks of maturity": para. 25.

> It would seem to me that, if one were to even consider the views of a child who was as young as age ten in the context of an Article 13 argument, the

level of maturity would have to be quite extraordinary. The court might look at some of the following earmarks of maturity, such as:

1. whether this child had made good decisions of a substantial nature for herself in other situations;

2. whether she had the ability and opportunity to, and in fact had reasonably weighed the more important competing benefits and disadvantages in reaching her decision;

3. whether her decision was reached with a reasonable measure of independence;

4. whether her fears relating to returning to the home state appear reasonable, in the circumstances—in particular in this case:

> (a) whether she had considered and understood that, even if the court acted on her wishes and allowed her to stay in Canada, her two younger sisters might have to return to England and leave her behind;
>
> (b) whether she had considered not only the scenario of living with her mother if she were to return to England, but also, the alternative of living with her father if she were to return to England pursuant to any order of this court; and
>
> (c) whether she had a reasonable appreciation of the potential consequences of her decision, should the court act on her views, especially in regards to her future relationship with her mother.

These are tall orders for a young child. The stronger the evidence that a child had touched some of these bases, the greater would be the court's comfort level in relying on this young child's views. Most ten-year-old children are never put in the position of having to demonstrate this level of maturity. In fact, one would never expect parents to place their child in a position of having to live with the consequences of making important "life" decisions using their as-yet undeveloped judgment. As children reach their teen years, assumptions can more readily be made about their maturity since they more regularly have opportunities to make important decisions for themselves on matters that younger children should never have to contemplate.

III. SPECIAL CONSIDERATIONS

A. Judicial Protocols

Article 2 of the *Hague Convention* states that Contracting States are under an obligation to use the most expeditious procedures available. The obligation of Contracting States to process return applications expeditiously also extends to appeal procedures.

The Canadian Network of Contact Judges recommended that Canadian courts give priority to all cases of inter-jurisdictional parental child abduction, either through the passage of procedural protocols or amendments to court rules. As of February 2010, most provinces and territories had adopted Protocols outlining the procedures to be followed when a *Hague Convention* application is received by the courts. Quebec and Nova Scotia have not adopted procedural protocols, but have adopted practices ensuring that applications are heard quickly.

Certain of these Protocols provide that they also apply, in modified form, to enforcement of interprovincial/territorial custody orders.

B. Direct Judicial Communication

The issue of direct judicial communications arises in cases whether there are concurrent proceedings in different jurisdictions with the same parties. In the context of parental child abduction it involves communication between the court in the place from which the child was taken and the court in the place to which the child was taken.

- There is national and international support for direct judicial communication in parental child abduction cases.
- Communication does not relate to the merits of the case and there are safeguards in place to ensure that the processes are fair, and do not interfere with the judicial independence of either Court.
- It is done with the knowledge of the parties, often in a joint hearing – with the parties and their counsel present.
- It can be used to coordinate and harmonize concurrent proceedings in other countries or provinces/territories with the participation of the parties so that a resolution of all the outstanding issues can be reached in a just, timely and cost effective way.
- The Canadian Network of Contact Judges [Superior Court Level] has developed recommended communication practices for judges] and a specific How to Communicate Guide.
- There are other processes in place:

- The British Columbia Supreme Court has adopted *Guidelines Applicable to Court-to-Court Communications in Cross-Border cases*, for all cross-border actions requiring court-to-court communications including, but not limited to insolvency and family proceedings.

Rule 86 of Nova Scotia's *Civil Procedure Rules* provides for communications between The Supreme Court of Nova Scotia and a court in another jurisdiction to assist either or both courts with the just determination of a claim or enforcement of a remedy; and for coordination or harmonization of a proceeding with a proceeding before a court in another jurisdiction.

C. Role of Central Authorities

Article 6 of the Hague Convention requires all signatory countries to designate a Central Authority to "discharge the duties which are imposed by the Convention upon such authorities. If the signatory country has more than one system of law the country can appoint more than one Central Authority. In Canada there is a federal Central Authority, as well as a Central Authority in every province and territory. All Central Authorities are required to "co-operate with each other and promote co-operation amongst the competent authorities in their respective State to secure the prompt return of children" (Article 7).

Because of the nature of Central Authority responsibilities, primary responsibility falls under provincial/territorial jurisdiction. The manner in which these responsibilities are exercised by Canadian Central Authorities differs in some aspects. All jurisdictions will receive and forward requests for return, provide information about the *Hague Abduction Convention*, provincial/territorial family justice services and means of obtaining counsel, as well as liaising with the other jurisdiction. Manitoba and New Brunswick (and in certain cases, Saskatchewan) go further, however, and provide legal services to have incoming requests for return dealt with by their Courts.

IV. PRACTICE TIPS

A. Generally

1. Consider, right at the start of a child abduction case, the issue of the child's rights to participate in all aspects of the decision making process, including, in Hague cases, the Article 13 right to object. They include rights to be informed generally about those rights, and about how they could participate at all stages of the proceedings, including settlement discussions.
2. Make sure you are using child friendly explanations and child friendly processes.
3. Consider, if there is not counsel for the child appointment, facilitating that appointment.
4. Consider how the child will participate, including whether the child should have a lawyer, and/or be added as a party.
5. If you are the child's lawyer, consider the specific nature of your role in the case.

6. Consider, if there are proceedings in your jurisdiction and another jurisdiction, asking the court to communicate with the court in the other jurisdiction.

B. Specific Relevant CRC Considerations

While the CRC in its entirely applies to children in cross-border abduction cases, here are some provisions in the General Comments of the Committee on the Rights of the Child which may be particularly helpful in dealing with the complex issues that arise. General Comments can be referred to by courts when interpreting both the Articles of the CRC and in interpreting Canadian legislation.

- **Provides Procedural Guarantees, including the Right to Legal Representation, not just Legal Information**

  Children have a right to legal representation:

  - when their best interests
  - are being formally assessed
  - by courts or equivalent bodies

  (General Comment 14, para. 96)

  In particular the child "should be provided with a legal representative, in addition to a guardian or representative of his or her view, when there is a potential conflict between the parties in the decision." (General Comment 14, para. 96)

  They are to know, when decision affecting them are made, the specific reasons for the decision, including:

  - how their best interests were a primary consideration and
  - if the decision is different from their views, why other considerations outweighed those views.

  (General Comment 14, para. 97)

- **A child's capacity must be assessed individually with no age limitation and no starting presumption of incapacity.**

  "Capable of forming his or her own views" should not be seen as a limitation, but rather an obligation to assess the capacity of the child to form an autonomous opinion (General Comment 12, para. 20).

  a. There is no age limit on the right of the child to express his or her own views and one should not be imposed (For more details see para 21)

  b. There cannot be a starting assumption that a child is incapable of expressing her or his own views. (para. 20)

c. On the contrary, Canada should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express the; it is not up to the child to first prove her or his capacity. (para. 20)

Capacity refers to cognitive capacity to form views and communicate them: ***B.J.G. v. D.L.G,*** 2010 YKSC 44 at para. 26-28.

- **Age alone cannot determine the significance of a child's views; there must be a case by case assessment of "due weight".**

"Being given due weight in accordance with the age and maturity of the child"

Age alone cannot determine the significance of a child's views. "Research has shown that information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacity to form a view. For this reason, the views of the child have to be assessed on a case by case basis." (General Comment 12, para. 29.)

- **Participation is a process, not a momentary act,**

Participation is a not a momentary act but a process of participation. (General Comment 12, para. 13)

- **The child can choose to participate in a proceeding either directly or through a representative.**

"Either directly or through a representative…"

This is a choice the child has the right to make. "Whenever possible the child must be given the opportunity to be directly heard in any proceedings." (General Comment 12, para. 35)

- **A child has the right to be informed about all aspects of the process.**

"The right to express those views freely"

Information: Involves a right to be informed about all aspects of the process (General Comment 12, para. 25)

- **A child should not be interviewed more than necessary.**

Only when necessary: A child should not be interviewed more often than necessary, especially when harmful events are being explored, as the "hearing' of a child is a difficult process that can have a traumatic impact on the child. (General Comment 12,para. 24)

- **The UN Committee recommends a five step implementation process: preparation (including information about the right to be heard and the process to be followed at the hearing); the hearing; assessment of**

capacity; information about the weight given to the views of the child; and complaints, remedies and redress. (General Comment 12, paras. 40 – 47)

Step one: Preparation (para. 41):

- **o** the child must be informed about
  - the right to express the opinion in all matters affecting the child, and, in particular in any judicial and administrative decision-making processes, and
  - about the impact his or her expressed views will have on the outcome
- **o** the child must be informed about the option of either communicating directly or through a representative and the consequences of this choice
- **o** the decision maker must adequately prepare the child before the hearing, providing explanations as to how, when and where the hearing will take place, who the participants will be, and has to take account the views of the child in this respect.

Step two: The hearing: (para. 42)

- o The context must be enabling and encouraging
- o "Experience dictates that the situation should have the format of a talk rather than a one-sided examination. Preferably, a child should not be heard in open court, but under conditions of confidentiality.

Step three: Assessment of capacity of the child (General Comment 12, para. 44)

Step four: Information about the weight given to the views of the child (the feedback (General Comment 12, para. 45)

- o Since the child has the rights to have his or her views given due weight, the decision maker has to:
  - inform the child of the outcome of the process and
  - explain how the views were considered.

Step five: Complaints remedies and redress. (General Comment 12, para. 46-47)

- **Avoiding Tokenism**

To avoid "tokenistic approaches" to children's participation, the Committee sets out some basic requirements for the implementation of the right of the child to be heard. All processes in which a child or children are heard and participate, must be: (General Comment 12, para. 134)

a) Transparent and informative – providing full, accessible, diversity sensitive and age-appropriate information about their participation rights;

b) Voluntary;

c) Respectful, giving respect to children's views;

d) Relevant to children's lives;

e) Child friendly;

f) Inclusive, recognizing that children are not a homogenous group;

g) Supported by appropriately trained adults;

h) Safe and sensitive to risk; and

i) Accountable.

V. ADDITIONAL RESOURCES

Katherine Kavassalis, (Legal Director), Caterina Tempesta, (Counsel), ***Advocating for Children in Parental Child Abduction Cases, PowerPoint Presentation***, Office of the Children's Lawyer, Ontario Ministry of the Attorney General, for the Association of Family and Conciliation Courts, New Orleans, Louisiana, May 2015.

The Hon, Donna Martinson, ***Children's Legal Rights to be Heard in Cross-Border Parental Child Abduction Cases,*** Prepared for: *Cross Border Child Custody Disputes – Judicial Networking and Direct Judicial Communication*, Judicial Officers Pre-Institute, Association of Family and Conciliation Courts, May 28, 2014, Toronto, Ontario.

Professor Nicholas Bala, Max Blitt Q.C. and Helen Blackburn, ***The Hague Convention and the Rights of Children***, The International Bar Association *Family Law Newsletter*, April 4, 2014.

Ontario's Office of the Children's Lawyer factum in ***A.M.R.I, v. K.E.R.,*** 2011 ONCA 417.

The Hague Permanent Bureau's website contains many useful resources: www.hcch.net See in particular Incadat, the Hague Conference on Private International Law International Child Abduction database:
http://www.incadat.com/