International Abductions Involving Non-Hague Signatory States: Key Distinctions in Procedure and Exceptions to Return

Association of Family and Conciliation Courts, Ontario Chapter

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Introduction

- Globalization has led to an increasing number of international marriages, where one spouse moves to another country either due to the other spouse's work, family or other reasons.
- Easier international travel, dual citizenships, more international marriages etc., have resulted in more international child abduction by parents
- From a theoretical perspective, Canadian provinces treat wrongful removals and retentions from non-Hague signatory states in a manner comparable to the Hague Convention: first, by declining to decide parental disputes on the merits with respect to children who do not habitually reside in the province or territory, and second, by favouring the return of children to the jurisdiction of their habitual residence. However, these similarities do not mean that an application brought under provincial legislation is treated the same way as one brought subject to the rules of the Hague Convention.



Where to Begin:

- **STEP 1**: Determine whether the country from which the child has been taken is a signatory state
  - Some states are signatories, but Canada has not recognized their accession (i.e. Guatemala, Nicaragua, Philippines, Russia, Thailand, Tunisia, Zambia)
- **STEP 2**: The case should be started in the jurisdiction to which the child has been taken
  - An application can be brought in either the Superior Court of Justice or the Ontario Court of Justice
- **STEP 3**: Hearing by Motion or Trial?
  - A.M.E.R v. K.E.R. (2011)
    - "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....
    - Where, however, serious issues of credibility are involved, fundamental justice requires that those issues be determined on the basis of an oral hearing....This applies with equal force to the determination of serious credibility issues in Hague applications involving refugee children. Expediency will never trump fundamental human rights."
- **STEP 4**: Be Aware of Timeframe
  - Key distinction: Hague cases must be disposed of promptly and not later than six (6) weeks after the case is commenced [Rule 37.2(3) – *Family Law Rules*]
  - Non-Hague cases are not subject to the same strict timeline but must also be addressed expeditiously. These cases often take longer to determine because of the additional time needed to marshal evidence related to foreign laws, expert opinions, etc.

PROCESS MAP

HAGUE

- The Convention can only be pleaded if both countries are contracting states
  - The case should be started in the jurisdiction to which the child has been taken
  - “any person or institution” exercising “rights of custody” at the time a child is removed from the habitual residence can apply
  - The contracting state from which the child is removed is the “requesting” state
  - The contracting state to which the child is removed to is the “requested” state
  - An application can be brought in either the Superior Court of Justice or the Ontario Court of Justice
  - Contact the Central Authority
- Preliminary Considerations:
  - Is the child 16 years of age or younger? (Article 4)
  - If so, was the child habitually resident in the “left-behind” jurisdiction? (Article 3(a))
  - If so, did the left-behind parent have “rights of custody”? (Article 3(a))
  - If so, was the left-behind parent exercising custody rights at the time the child was removed or retained? (Article 3(b))
  - If the answers to above questions are “yes”, are there any exceptions in the individual case recognized in the Convention to the general expectation that the child will be returned to his or her place of habitual residence? (Articles 12 and 13)

NON-HAGUE

- The applicable legislation in Ontario is the *Children’s Law Reform Act*
- Similar to Hague Convention cases, the first step in a wrongful removal/retention case is an assessment of jurisdiction under section 22
- If the Court does not have jurisdiction, the Court must consider if there is an exceptional circumstance that would allow it to assume jurisdiction – the only exception is that of serious harm under section 23
- If no serious harm is found, the court can decline jurisdiction and then exercise any one of its residual powers for the return of the child to an appropriate place under section 40

Comparative Overview

HAGUE

- Governing framework: *Hague Convention on Civil Aspects of International Child Abduction* (which has been adopted into legislation)
- Age limit – 16 years
- Habitual residence: no definition in the Convention; look to *OCL v. Balev* (hybrid test):
  - requires the Court to consider the nucleus or focal point of the child's life immediately prior to the wrongful removal or retention together with other factors like the length, conditions and purpose for the child's move along with any other relevant circumstances.
  - A child's habitual residence "corresponds to the place which reflects some degree of integration by the child in a social and family environment" and "taking into account all the circumstances of fact specific to each individual case".
  - No single factor is determinative or dominates the analysis.
- Acquiescence or Consent:
  - Art 12 provides that if child is "settled in new environment" and one year or more, then court may decline to order return.
  - Art 13 requires knowledge of relocation with child. In determining whether Article13(a) applies, consider knowledge and communication (Ibrahim v. Girgis, 2008 ONCA 23):

    "acquiescence is a question of the aggrieved parent's subjective intention, not one of the outside world's perceptions of that intention. Subjective intention can be demonstrated through conduct, but such a demonstration requires the abducting parent to show 'clear and cogent evidence ' of 'conduct . . . which is inconsistent with the summary return of the children to their habitual residence' . Moreover, to override the mandatory return mechanism, the acquiescence must be "unequivocal".
- Exception to return – Article 13(b): grave risk of harm

NON-HAGUE

- Governing framework: *Children's Law Reform Act*
- No age limit – as long as meets definition of child under *CLRA*
- Habitual residence: section 22(2) and *Dunmore v. Mehralian*
- Acquiescence or Consent: no specific provision under CLRA, but linked to question of habitual residence "with consent, implied consent or acquiescence of other parent" – section 22(2)
- Exception to return – section 23: serious harm
- Section 40 residual powers of Court – no requirement to return child to "habitual residence" but rather "appropriate place"

PROCEDURAL DISTINCTION:

NON-HAGUE SIGNATORY STATES



Determining Jurisdiction: Section 22(1)(a)

- Section 22(1)(a) – the child is habitually resident in Ontario at the commencement of the proceeding. The CLRA defines habitual residence under section 22(2) as being a child that was either, a) living with both parents, or b) where the parties are separated, living with one parent under a separation agreement, court order or with consent (implied or acquiescence) or with a person other than a parent on a permanent basis for a significant period of time.

- This section is rarely satisfied, particularly because most children have not been in Ontario for very long when these applications commence, or there is a lack of consent demonstrated by the left-behind parent's application for the return of the child.

Determining Jurisdiction: Section 22(1)(b)

- Section 22(1)(b) – where the child is not habitual resident, the court looks to 6 separate criteria:
  - The child is physically present in Ontario at the commencement of the application
  - Substantial evidence concerning the best interests of child is available in Ontario
  - No application respecting parenting with respect to the child is pending before an extra-provincial tribunal or another place where the child is habitually resident
  - No extra-provincial order respecting parenting has been recognized by a court in Ontario
  - The child has a real and substantial connection with Ontario
  - On a balance of convenience, it is appropriate for jurisdiction to be exercised
- All six (6) criteria must be satisfied in order for the court to assume jurisdiction (conjunctive requirement)

Habitual Residence: Section 22(2) *CLRA*

- Unlike the Hague Convention, the *CLRA* contains a definition of habitual residence as follows:
- Section 22(2) A child is habitually resident in the place where the child resided in whichever of the following circumstances last occurred:
  1. with both parents
  2. If the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order
  3. With a person other than a parent on a permanent basis for a significant period of time

Dunmore v. Mehralian: The Debate Over Habitual Residence Resolved

- The CLRA's contains a definition habitual residence under section 22(2)
- The prescribed time is last time the child either lived:
  - With both parents,
  - If the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order
  - With a person other than a parent on a permanent basis for a significant period of time
- The Supreme Court of Canada determined the issue of how habitual residence is to be interpreted in the context of non-Hague Convention cases
- The ordinary meaning of "to reside" is simply "to live or be at home in a place"; residence is not to be interpreted rigidly but using a factual approach, focusing on where the child was "at home," rather than a formalistic reliance on parental intent
- The Court clarified that habitual residence is determined by the child's reality, not merely the parents' plans or intentions. Such an approach is less appropriate in non-Hague Convention cases where other jurisdictions may not be guided by best interests.

Habitual Residence Continued…

- General principles for determining where a child resides:
  - physical presence is neither necessary nor sufficient;
  - permanence is not required;
  - for very young children, caregivers' ties (incl. intentions) weigh more heavily;
  - children can reside in multiple jurisdictions
  - Courts should look at "all relevant links and circumstances," such as:
    - use of social services
    - linguistic/cultural/educational/social ties
    - family presence
    - duration/reasons for being in jurisdiction
    - social context for migrant children
    - gender dynamics
    - family violence

EXCEPTIONS TO RETURN

- **Presumption of Return**
  - Part III of the *CLRA*, Section 19:
    a) to ensure that applications will be determined on the basis of the best interests of the children;
    b) to recognize that the concurrent exercise of jurisdiction of more than one province, territory or state in relation to the determination of decision-making responsibility with respect to the same child ought to be avoided, and to make provision so that the courts of Ontario will, unless there are exceptional circumstances, refrain from exercising or decline jurisdiction in cases where it is more appropriate for the matter to be determined by a tribunal having jurisdiction in another place with which the child has a closer connection;
    c) to discourage the abduction of children as an alternative to the determination of decision-making responsibility by due process; and
    d) to provide for the more effective enforcement of parenting orders
- **Section 23**
  - where the child is physically present in Ontario, but on a balance of probabilities the court is satisfied that the child would suffer serious harm if they remain or return to the care of the person entitled to custody
  - Every province in Canada has some version of a serious harm exception enacted into legislation

Serious Harm vs. Grave Risk of Harm

Serious Harm – Section 23 *CLRA*

- A holistic approach needs to be applied based upon a non-exhaustive combination of factors, which must be assessed while considering the best interests of the child:
- The risk of physical harm
- The risk of psychological harm
- The views of the child
- A parent's claim that they will not (or cannot) return to the other jurisdiction even if the child is required to do so
- Potential separation from their primary caregiver
- Citizenship (as an element of psychological harm)
- The rules applicable to deciding parenting rights in the foreign jurisdiction

Grave Risk of Harm – Article 13(b)

- The risk associated may be in returning the child to the other parent or from the removal of the child from their present caregiver
- The harm may be physical or psychological
- Harm must amount to an intolerable situation, which the Supreme Court of Canada in Thomson v. Thomson defined as:

> *"… the risk has to be more than ordinary risk, or something great than would normally be expected on taking a child away from one parent and passing him to another… not only must the risk be a weighty one, but that it must be 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'."*
> (paragraph 82)

Why the Threshold Difference Matters

Serious Harm: Lower Threshold

- Lower threshold comes primarily from the assumption that non-signatory states are not bound to place the best interests of children first in determinations of custody
- The Ontario Court of Appeal, in Ojeikere has held that decisions regarding serious harm under s. 23 of the CLRA have a less stringent threshold than art. 13(1)(b) cases under the Convention because:
    - i) the language of "intolerable situation" in art. 13(1)(b) imports a more stringent standard than simply "serious harm" under s. 23
    - ii) cases involving non-Hague countries do not provide the reassurance that decisions in the country of return will be made giving paramountcy to the best interests of the child
    - iii) there is no reciprocal treaty enforcement
- CLRA does not use the word "risk", however an Ontario Court must still assess the possibility or risk of harm arising from a child's removal. Risk is not assessed from a past event, but rather based upon a prediction of future harm both in terms of the likelihood and the severity

Grave Risk: A More Stringent Test

- Courts of a contracting state are presumed to be equipped to make and will make suitable arrangements for a child's welfare because they are dedicated to best interest principles
- Less stringent tests would permit the abducting parent to rely upon psychological conditions of their own making including refusing to return the child
- Undertakings and warranties are honoured by the contracting state and may serve to respond to/alleviate any pressing risk of harm to the child
- The return application should not become a hearing of the custody matter on the merits and so comparative investigations as to the environments offered by the two countries in question should be avoided

Domestic Violence Considerations

HCCA and Domestic Violence

- HCCA most often used by fathers with joint legal custody or similar rights invoke HCCA to require return by primary care mothers (over 2/3 of cases)
- Are women and children being forced to return to live close to abusive fathers? What role for rights and wishes of children?
- At the time of enactment of Hague Convention, not much appreciation of children's rights. UN Convention on Rights of Child in 1989
- New context gives "rise to issues which had not been foreseen by the drafters of the Convention." (2006 Special Commission)
- In the 1980's most Hague cases took a very narrow approach to Article 13(b), based on belief that this would best fulfill objectives of the Convention.
- By 1990s there were concerns that victims of family violence and children were being returned to situations of danger and that the Hague Convention was not providing adequate protection
- Courts and HCCA "Guide to Good Practice" on Article13(1)(b) now recognize that "grave risk" includes risk to children and caregiving parent from domestic violence, which requires consideration of:
    - veracity of allegations
    - nature of domestic violence
    - isolated incident vs coercive control
    - adequacy of legal protections in jurisdiction of habitual residence

CLRA and Domestic Violence

Family violence provision under the *CLRA* is instructive in terms of domestic violence considerations:

- The nature seriousness and frequency of the family violence and when it occurred
- Whether there is a pattern of coercive and controlling behaviour in relation to the family member
- Whether the violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence
- The physical, emotional and psychological harm or risk of harm to the child
- Any compromise to the safety of the child or their caregiver/another member of the family
- Look to *Ahluwalia 2026 SCC 16* for indicia of coercive controlling behaviour and link to serious harm

Inconsistencies in Application of Law in Foreign Jurisdiction

- International child abduction and the implications of serious harm as part of the return analysis require Courts to be live to divergent legal and cultural traditions which may impact their assumptions and analysis.
  - “Nonetheless, there may be instances where foreign laws are so profoundly irreconcilable with Ontario law that remitting the matter to the foreign courts would constitute serious harm within the meaning of the CLRA. Drawing the line between what is acceptable and what is not is a delicate exercise. […] The proper approach recognizes that inconsistencies between local and foreign legal regimes will usually not amount to serious harm if the best interests of the child principle remains the paramount consideration in all decisions concerning children. However, if the incompatible rule automatically applies in a manner that supersedes the best interests of the child, this will be a determinative factor in the serious harm analysis, when s. 23 is read in light of s.19(a) of the CLRA.”
- It is important for counsel and the judiciary to understand how best to address elements of a foreign legal system which may be rooted in a religious or patriarchal tradition or perhaps where gender roles have different implications.
- Balancing a respect for diversity and competing human rights will invariably impact what qualifies as serious harm. Counsel are nevertheless encouraged to consider culture-based arguments because in certain circumstances, inequality among men and women, or rather make gender-based determinations regarding decision making responsibility, the inability of a woman to work or financial support herself, the perception of persons with disabilities or members of the queer community, all may give rise to serious harm.

Best Interests: Paramount Consideration in Both Hague and Non-Hague Convention Cases

- The Supreme Court of Canada has emphasized that the analysis of the child's best interests in the context of parenting disputes must be undertaken from the lens of the child rather than the parents' perspectives; parental preferences and rights do not play a role in the analysis except to the extent that they are necessary to ensure the best interests of the child:
- "…As a general rule in Canadian family law, it is undoubtedly the case that the best interests of the children are the paramount consideration for all decisions that concern children and that best interests are measured from the child's perspective […] This is no less true in matters of international abduction, whatever the child's country of origin, and whether or not the Hague Convention governs the dispute." (F. v. N. at paragraph 61)
- However, the best interests test requires a "differing application" in questions of jurisdiction versus determinations on the merits of parenting decisions, although there may be overlap

F. v. N. : Serious Harm and Best Interests

- The risk of serious harm in s. 23, starts from the ordinary alignment of best interests and focuses on factors that would establish serious harm if the child was returned.
- The court is not, however, engaged in a determination of the custody issues – on that basis, they are not engaged in a broad-based best interests inquiry as they would on the merits of a custody application.
- Thus, when deciding whether to exercise jurisdiction under s. 23, judges should not conduct a broad-based best interests analysis, but rather an individualized assessment of the risk of serious harm. There is, of course, no doubt that an individualized serious harm analysis may overlap with a full best interests analysis.
- The best interests factors provided under s. 24 of the CLRA will only be relevant to the extent that they contribute to establishing serious harm.

Section 40: Return Orders

- If a Court is satisfied that a child has been wrongfully removed to or is being wrongfully retained in Ontario or that they are not able to exercise jurisdiction under section 22 or section 23, then section 40 is invoked and a Court may do any one or more of the following:
  - 1. Make such interim order in respect of the custody or access as the court considers is in the best interests of the child
  - 2. Stay the application subject to,
    - The condition that a party to the application promptly commence a similar proceeding before an extra provincial tribunal, or
    - Such other conditions as the court considers appropriate
  - 3. Order a party to return the child to such place as the court considers appropriate and, in the discretion of the court, order payment of the cost of the reasonable travel and other expenses of the child and any parties to or witnesses at the hearing of the application

Section 40 Continued…

- Unlike the Hague Convention which requires the return of a child to their habitual residence, the Courts are given broader discretion in situations where a child has been wrongfully retained/removed
- Section 40 makes no reference to returning a child to their habitual residence no reference to it at all in the section
- Return is to an “appropriate place” does not, however, permit an indefinite stay in Ontario
- Judges can also stay the application on conditions, which allows them to delay the children’s return until they are satisfied that proper arrangements have been made and that the competent authorities are seized of the dispute, if necessary

Undertakings: A New Emerging Trend from the SCC decision in F. v. N.

- With signatories to the Hague Convention, Canada has reciprocity, assurances of a best interests analysis in all signatory states, warranties, and an ability to enforce undertakings
- The SCC recognizes that undertakings in non-Hague Convention cases may present problems of enforceability before foreign courts, however they are well-known and relied upon protective measures in international abduction cases around the world and should not be dismissed as a useful tool
- This raises a series of other questions:
  - What will these undertakings mean?
  - Do they have any force? Are they binding?
  - How will they be implemented and applied?
  - When there is a breach of undertakings, in a country where there is no reciprocity – that is no reciprocal agreements to enforce undertakings – what happens?
  - How do we grapple with the fact that there is no mechanism to enforce the undertakings in these foreign jurisdictions?
  - What about undertakings that are contrary to the public policy of foreign nations?

Undertakings: Important Considerations from the US Supreme Court in *Golan v. Saada*

- This is a case that addresses undertakings, or what the Court described as ameliorative measures within the context of a Hague Convention Case involving Italy
- However, it presents important considerations that counsel could raise in the context of undertakings in non-Hague Convention cases:
  - Courts should decline to consider ameliorative measures that have not been raised by the parties, are unworkable, where the expectation is that the measures will not be reasonably followed, or draws the court into determining the custody proceedings or risk prolonging the proceeding
  - Courts may also find the serious harm is of such concern, or the potential harm so severe, that the ameliorative measures would be inappropriate

If Undertakings are Appropriate

- Counsel should consider what undertakings can be included, if jurisdiction is declined, that would help cure any uncertainties in status, or financial hardship that may be alleviated
- Be sure to address the following and ensure that the terms are reasonable and will be satisfied:
  - Logistics – when and how return is to be facilitated
  - Financial issues – interim support and payment of return flights, interim housing and meeting the child's other needs
  - Obtaining immigration status
  - Withdrawing criminal proceedings or travel bans
  - Incidents of abuse – how best to protect the parent and child from exposure

Resources

GLOBAL AFFAIRS CANADA

Consular Services

125 Sussex Drive, Ottawa ON K1A 0G2

1-800-387-3124 (toll-free from Canada and the United States) or
+ 1 613 996 8885 (call collect where available)

sos@international.gc.ca and travel.gc.ca

CANADA BORDER SERVICES AGENCY

+1 204 983 3500 / +1 506 636 5064

h0tomcg@cbsa-asfc.gc.ca or cbsa.gc.ca

ROYAL CANADIAN MOUNTED POLICE

National Missing Children Services: CanadasMissing-DisparusCanada@rcmp-grc.gc.ca or canadasmissing.ca

CENTRAL AUTHORITY FOR ONTARIO

Ministry of the Attorney General

Steeles West Post Office, PO Box 600, Toronto ON M3J 0K8

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Contact persons: Vivian Giang, Shane Foulds, Elizabeth Kay, Melanie Llerena or Sharon Wiltshire