

## **CANADA'S ANSWER TO THE QUESTIONNAIRE CONCERNING THE OPERATIONS OF THE CONVENTION AND VIEWS ON POSSIBLE RECOMMENDATIONS**

*This Report provides a general overview of the practices and operation of the Convention in the Canadian jurisdictions. For any specific information on the operation or practice in a Canadian jurisdiction, please contact the relevant Canadian Central Authority in the province or territory (See Hague web site).*

### **(1) The role and functioning of Central Authorities (CAs)<sup>1</sup>**

- *General questions:*

1 Have any difficulties arisen in practice in achieving effective communication or co-operation with other CAs in accordance with Article 7 of the Convention? If so, please specify.

- lack of co-operation and communication with certain Central Authorities ("CAs") including no acknowledgement of receipt and no information on the progress of the case. In one example, a Canadian CA discovered that a foreign judge had asked for additional information and evaluations from the applicant parent (in Canada) but neither the parent or the Canadian CA had been informed of that request. The judge refused to return the child to Canada.
- requirement of certain CAs to deal exclusively with paper requests even in the event of urgency
- difficulty in obtaining information of a general character as to the law of the State in connection with the application of the Convention (article 7(2)(e))
- - difficulty for the applicant parent to find counsel
- sending a file two or three times because the CA apparently has not received it or cannot find it. Files are now delivered by hand.
- lengthy delays
- constant changes in personnel
- need to rely on Canadian consular services to facilitate communication between CAs in some instances

2 Have any of the duties of CAs, as set out in Article 7, raised any problems in practice?

No

- *Particular questions:*

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<sup>1</sup> Conclusion IV of the first Special Commission called upon States to:

"... give their Central Authorities adequate powers to play a dynamic role, as well as the qualified personnel and resources, including modern means of communication, needed in order expeditiously to handle requests for return of children or for access". (Overall Conclusions of the Special Commission of October 1989 on the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, February 1990, Conclusion IV at p. 45.)

Conclusion 3 of the second Special Commission to review the operation of the Convention was as follows:

"The Central Authorities designated by the States Parties play a key role in making the Convention function. They should act dynamically and should be provided with the staff and other resources needed in order to carry out their functions effectively." (Report of the second Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction, June 1993, Conclusion 3 at p. 16.)

3 What measures are taken by your CA or others to secure the voluntary return of a child or to bring about an amicable resolution of the issues (Article 7 c))? Do these measures lead to delay?

- The CA is not always involved in settlement discussions. Some CAs will send letters to the abducting parent suggesting the voluntary return of the child, after evaluating the risk of another removal of the child. The CA may be involved indirectly to initiate contact with other authorities (for example, police authorities) who may be involved with bringing about amicable solutions. Other CAs rely on counsel or parents to negotiate an amicable return.
- It was noted that where parents do not initially have counsel, they retain counsel once served with a request for return and that negotiations often begin once a date has been set for the return hearing. A settlement meeting or preliminary review of circumstances with the client may be used to convince the client of making a voluntary return.
- Negotiation for voluntary return will create only small delays. It does not prevent the parent/counsel from pursuing the case and obtaining legal aid, if applicable.

4 What measures does your CA take to provide or facilitate the provision of legal aid and advice in Hague proceedings, including the participation of legal counsel and advisors (Article 7 g))? Do these measures result in delays in your own jurisdiction or, where cases originate in your country, in any of the requested jurisdictions?

- Provinces and territories, with the exception of Manitoba, made a reservation to limit the coverage of costs of legal representation to the coverage provided under the legal aid system (article 26 of the Hague Convention). In Manitoba, Family Law Branch Crown Counsel presents incoming requests for return to the courts. The CA's role is essentially as a friend of the Court. In New Brunswick also, the Attorney General provides the legal services of Crown Counsel to act on behalf of the applicant in all incoming applications and for the purpose of outgoing applications but only if the in-province applicant is indigent. Parents can retain private counsel if they wish.
- In the other provinces and territories, the applicant's costs will be covered by legal aid only if the applicant otherwise qualifies for legal aid assistance in that province or territory.
- The CAs in Canada will initiate and facilitate contact with their provincial/territorial Legal Aid program. The CAs will also provide names of lawyers familiar with and interested in doing Hague applications to applicants in other countries and locally. The Bar Associations can also be an excellent source for referrals of attorneys who specialize in family law and international law. Every effort is made to expedite and assist in selecting or appointing counsel.
- Delays are related to the time it takes the applicant parent to find counsel, either through legal aid or privately. Delays are also incurred for applicants applying for legal aid in Ontario as the applicant has to provide a letter from their legal aid authority that they qualify in their country, as well as providing undertakings.

5 Does your CA represent applicant parents in Hague proceedings? If so, has this role given rise to any difficulties or conflicts, for example with respect to other functions carried out by your CA?

- Manitoba's CA does represent applicant parents but in their capacity as Crown Counsel for the Minister of Justice/CA of Manitoba. Family Law Branch Crown Counsel presents incoming requests for return to the courts. Counsel prepare the necessary court application, liaise with the CA in the other jurisdiction and communicate with the left-behind parent and his/her counsel, if applicable, to obtain affidavit evidence and convey information. The parent/counsel will be given information as to the material needed to submit a request for return to court. Manitoba Justice Family Law Counsel will review draft affidavit materials and complete an application for return that meets the court's procedural requirements. Family Law Branch Counsel will submit the request for return to the court and raise the relevant arguments in favour of return. Unlike private counsel, however, (and like any Crown Attorney) Counsel have a greater obligation to the court and will identify issues, if applicable, that may impact on the court's decision to order a child's return. If Counsel feel there would be merit to an appeal and the requesting parent wishes to appeal, Counsel will do so. Alternatively, a parent may retain private counsel to act on their behalf, if they wish.
- The CA for the province of New Brunswick is in the head office of the Public Prosecutions branch of the Department of Justice. Staff lawyers in the regions of the province will go to court and represent the applicant parent on incoming applications. For the purpose of outgoing applications, counsel in the head office, acting for the CA, will prepare the application and supporting documentation for indigent parents. No apparent conflict has resulted to date. Parents can retain private counsel if they wish.
- The CA for Quebec does not represent applicant parents. However, Quebec's attorney general intervenes in all return proceedings before the courts. A prosecutor is always present at the return hearing, therefore, but essentially plays the role of *amicus curiae* as a neutral and exclusive representative of the CA for Quebec.
- Other provincial and territorial CAs do not represent parties.

6 What obligations does your CA have, and what measures does it take, to ensure that a child returned to your country from abroad receives appropriate protection, especially where issues of (alleged) abuse or violence have arisen?<sup>2</sup> In particular, does your CA:

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<sup>2</sup> Respondents are reminded of the discussions which took place during the third Special Commission (see Report of the third Special Commission, *op. cit.* footnote 3, especially paragraphs 57 to 64 and Annexes I to III). The synthesis of that discussion, as drawn up by the Permanent Bureau (see Annex III), was as follows:

"1 To the extent permitted by the powers of their Central Authority and by the legal and social welfare systems of their country, Contracting States accept that Central Authorities have an obligation under Article 7 *h* to ensure appropriate child protection bodies are alerted so they may act to protect the welfare of children upon return until the jurisdiction of the appropriate court has been effectively invoked, in certain cases.

2 It is recognised that, in most cases, a consideration of the child's best interests requires that both parents have the opportunity to participate and be heard in custody proceedings. Central Authorities should therefore co-operate to the fullest extent possible to provide information respecting, legal, financial, protection and other resources in the requesting State, and facilitate contact with these bodies

- a* ensure that appropriate child protection bodies are alerted;

The CA will notify the appropriate child protection agency if issues of child protection have been raised. The agency will investigate the allegations. This may include additional requests for information by the agency prior to the child's return or apprehension of the child on his/her arrival in the province or territory, with placement with the abducting parent or a third party until the investigation is completed. In Alberta, this can include placing the child in care pending custody proceedings and providing parents with information about Child Welfare services and how to access them.

- b* provide information to either parent in respect of legal, financial, protection and other resources in your State;

Information can be provided to a returning parent with respect to legal aid and legal referral services, as well as services available to them, for example, for victims of violence (women's shelters, information lines, police contacts, etc.).

- c* facilitate contact with bodies providing such resources;

The CA's intervention is limited to referring the parents to the services available to them. If difficulties arise, CAs can support the parents' initial efforts to contact these agencies and explain the situation.

- d* assist in providing any necessary care for the child pending custody proceedings;

Generally, the courts hearing the cases will ensure the protection of the children during the proceedings.

Quebec's CA will put protection measures into place via the co-operation of the Director of Youth Protection, who enforces the *Youth Protection Act* (R.S.Q., c. P-34.1) if the return order states so.

- e* provide any other support, advice or information to a parent who accompanies the child on return;

This type of request is rare. However, if the parent contacts the CA, they can offer advice and information.

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in appropriate cases.

[3 The measures which may be taken in fulfilment of the obligation under Article 7 *h* to take or cause to be taken an action to protect the welfare of children may include, for example:

a) alerting the appropriate protection agencies or judicial authorities in the requesting State of the return of a child who may be in danger;

b) advising the requested State, upon request, of the protective measures and services available in the requesting State to secure the safe return of a particular child;

[c] providing the requested State with a report on the welfare of the child;]

d) encouraging the use of Article 21 of the Convention to secure the effective exercise of access or visitation rights.]"

- f* provide any assistance in ensuring that undertakings attached to a return order are respected.

This depends on the specific situation. In Quebec, the CA will provide assistance if the nature of the CA's involvement is specified in the decision ordering these undertakings. Compliance with these undertakings will also be overseen by the Quebec courts.

In Alberta, the Children's Services and the CA would assist in insuring that undertakings attached to a return order are respected where practicable; but neither Children's Services nor this office would consider itself bound by undertakings entered into between third parties unless the CA had been consulted and had agreed to them in advance.

The CA of Manitoba does not represent a returning parent's interests as such (e.g. ensuring respect for undertakings, seeking custody or restraining orders). If apprised of breached undertakings, the CA can provide information to the Court and to both parents' counsel.

- 7 What arrangements does your CA make for organising or securing the effective exercise of rights of access (Article 7 *f*)?

In particular, in the case of an applicant from abroad,<sup>3</sup> does your CA:

- a* provide information or advice;

Most CAs will provide general information but refer the applicant to a lawyer to obtain advice. In Quebec, the CA provides both information and offers advice to parents and lawyers.

In an access case, Manitoba's CA will liaise with the CA of the jurisdiction of the parent with the access problems and assist that parent in locating or obtaining legal counsel through Legal Aid or privately.

- b* facilitate the provision of legal aid or advice;

The CAs do not represent applicants in access applications. The parent will be provided with Legal Aid if they meet the eligibility criteria of the province. Otherwise, the CAs will provide names of lawyers familiar with and interested in doing Hague applications. The Bar Associations can also be an excellent source for referrals of attorneys who specialize in family law and international law.

In addition, the CA of Manitoba may monitor progress of any Court proceedings, appear in Court to monitor proceedings (watching brief)

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<sup>3</sup> In answering these questions please distinguish where appropriate between:

- a* applications pending return proceedings;  
*b* applications following a refusal to return a child;  
*c* applications not made in connection with other proceedings; and  
*d* applications to modify existing access orders.

Please note also that the term "access" should be read as including all forms of contact.

and convey information from or provide status updates to the requesting CA.

- c initiate or assist in the institution of proceedings, where appropriate, on behalf of the applicant;

New Brunswick's CA will. Other CAs will refer to legal aid or private counsel.

- d assist in ensuring that the terms or conditions on which access has been ordered or agreed are respected;

New Brunswick's CA will. Other CAs will refer to legal aid or private counsel.

Quebec will send a letter to the parent who is refusing to allow the applicant parent to exercise his or her access rights. Often the parent is contacted by telephone and the CA tries to persuade him or her to send the child to visit the other parent as provided for under the order made in Quebec or elsewhere. These steps are always taken with the best interests of the children in mind.

- e assist in cases where modification of existing access provisions is being sought.

CAs will refer the applicant to legal aid or private counsel.

Quebec will intervene if the parent requesting modification is not already represented.

In addition, the CA of Manitoba may monitor progress of any Court proceedings (watching brief) and convey information from or provide status updates to the requesting CA.

- 8 Please comment on any developments in relation to the maintenance of statistics concerning the operations of your CA. Has your CA been able to return to the Permanent Bureau annual statistics in accordance with the Hague standard forms? If not, please explain why?

- Provincial and territorial CAs provide statistical information to Canada's Federal CA when requested to do so. Canada has relied, nationally, on *ad hoc* and manual collection of data and statistics relating to Hague Convention cases.
- A potential long-term remedy is currently being explored by relevant Canadian authorities. An electronic case management system that is used for consular cases and which includes some Hague and non-Hague cases as well and which has significant statistical reporting capabilities might be made available to all Canadian CAs. More regular preparation of national statistics and reporting would be possible with this system.

- 9 Can you affirm or reaffirm, as the case may be, support for the conclusions reached by the first, second and third Special Commissions, as set out in footnotes 11 and 12?

- YES, all Canadian CAs reaffirm their support for the conclusions reached by the first, second and third Special Commissions.

10 Would you support any other recommendations in respect of the particular functions which CAs do or might carry out, especially with regard to the matters raised in questions 6 and 7 above?

- Canada would support recommendations relating to 6a), 6b), 6c), 6e), 7a) and 7b). The Canadian CAs already carry out these recommendations to some extent.
- However, divergent operational capacity between some CAs would make it difficult for Canada to support recommendations to 6d), 6f), 7c), 7d), and 7e) without further consultations on specific recommendations.
- With respect to access cases, the Canadian government (except through the provision of Legal Aid to qualifying parents) does not directly assist Canadian parents seeking to enforce access obligations. Legal Aid to enforce or establish access is available to qualifying foreign parents in most provinces.
- It is important to note that the *1996 Convention on the Protection of Children* might offer solutions for some of the above-noted recommendations.

**(2) Judicial proceedings, including appeals and enforcement issues, and questions of interpretation<sup>4</sup>**

1 How many courts and how many judges potentially have jurisdiction to hear an application for the return of a child? If there is more than one level of jurisdiction at first instance, please specify the number of courts and judges for each level.

- The courts in Canada, with the exception of Nunavut,<sup>5</sup> are organized in a 4-level structure: provincial trial courts, provincial superior courts - general trial division, provincial superior courts - appeal division and the Supreme Court of Canada.
- The common law provinces maintain distinct levels of trial courts based on the British model: superior courts with unlimited monetary and substantive jurisdiction, county/district courts - restricted both in subject matter, monetary value and geographic location, and inferior courts e.g. small claims. Quebec, the civil law province has two levels of courts.<sup>6</sup> Some provinces have created a unified family court system in an attempt to simplify the existing court system.
- Manitoba has a province-wide unified family court at the superior court level, the Family Division of the Court of Queen's Bench. Applications respecting requests for return in Manitoba are prepared and filed by Family Law Branch counsel. They are submitted to the Family Division of the Court of Queen's Bench. There are 14 designated Family Division Justices (including the Associate Chief Justice). From time to time

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<sup>4</sup> Delay in legal proceedings has long been identified as a major cause of difficulties in the operation of the Convention. For example, the second Special Commission called upon States Parties to make "all possible efforts ... to expedite such proceedings." (Report of the second Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction, June 1993, Conclusion 7 at p. 18.)

<sup>5</sup> The Nunavut Court of Justice, established April 1, 1999, is a single level trial Court including both Provincial and Superior trial court jurisdictions. Due to remoteness, other Nunavut institutions, officers or procedures may vary slightly from the general presentation herein.

<sup>6</sup> Department of Justice Canada web site, *Canada's Court System*, <<http://www.canada.justice.gc.ca>>.

Judges of the General Division also rotate into the Family Division and hear family cases.

- In New Brunswick, the Court of Queen's Bench - Family Division has jurisdiction to hear applications under the Hague Convention. Eight Family Division justices are designated full time to the Family Division with three acting part time. In theory, all 24 judges of the Court of Queen's Bench in the province both Family Division and Trial Division have jurisdiction to hear these cases.
- In the Northwest Territories, matters are referred to the Supreme Court of the NWT. There are three judges of that court. (NWT)
- In Quebec, the Superior Court has jurisdiction to hear return applications under the Hague Convention. The court sits in 36 locations in Quebec and approximately 150 judges are competent to hear such applications. The Court of Appeal sits in Quebec City and Montreal. The 23 judges of the Court (including supernumerary judges) have jurisdiction to hear appeals from decisions of the Superior Court.
- In Saskatchewan, there is one level of trial court (Court of Queen's Bench) as well as a level for appeals. There are 40 judges with the Court of Queen's Bench and 9 judges with the Court of Appeal.
- In Alberta, there is one level of Court with the jurisdiction to hear an application for return in the first instance. There are approximately 40 to 45 Judges appointed to that court in the area covered by the Edmonton office of the CA.
- In Ontario, there are two levels of court that can hear a matter at first instance – the Ontario Court of Justice and the Superior Court of Justice.

2 Do you have any special arrangements whereby jurisdiction to hear return applications is concentrated in a limited number of courts? Are such arrangements being contemplated?

- Some provinces have created a unified family court system in an attempt to have family law cases heard in a specialized, focussed court with related social services. For example:
- Manitoba Hague Convention cases are heard at first instance in the Family Division of the Court of Queen's Bench, the province-wide unified family court.
- Saskatchewan has a Family Law Division of the Court of Queen's Bench which has exclusive jurisdiction over family matters in three of its large urban centres.
- In Quebec, the Superior Court is the competent judicial authority to hear return applications for Quebec. This Court has approximately 150 judges (including supernumerary judges). All these judges are competent to hear such applications throughout Quebec. However, statistics show that 85% of applications are heard in Montreal. This considerably reduces the pool of judges that hear such applications.



- 3 What measures exist to ensure that Hague applications are dealt with promptly (Article 7) and expeditiously (Article 11)? In particular:
- a* is it possible for the application to be determined on the basis of documentary evidence alone?
- Courts usually deal with Hague cases in summary applications on affidavit evidence. The rules of evidence are found in the provincial or territorial legislation/court rules applicable in the jurisdiction in which the case will be heard. The usual rules of evidence apply to Hague Convention defenses (e.g. hearsay, opinion evidence, etc.). There are no special rules or treatment provided for Hague Convention cases with the exception of article 14 of the Convention.
  - An oral hearing with oral evidence may be held if necessary, e.g. to determine whether a defence under article 13 (b) is established.
  - Article 34 of the *Civil Code of Quebec* requires that the Court, in an application brought before it affecting the interest of a child, give the child an opportunity to be heard if his or her age and power of discernment permit it. The new Civil Code is in force since January 1, 1994 and it remains to be decided if article 34 applies to a Hague Convention application, and to what extend.
- b* what special measures/rules exist to control or limit the evidence (particularly the oral evidence) which may be admitted in Hague proceedings?
- There are no special rules or treatment provided for Hague Convention cases with the exception of article 14 of the Convention. The usual rules of evidence apply to Hague Convention defenses (e.g. hearsay, opinion evidence, etc.).
- c* who exercises control over the procedures following the filing of the application with the court and prior to the court proceedings, and how is that control exercised?
- Procedures are found in the Rules of Civil Procedure of the province or territory. The judge or the lawyer retained to represent the applicant can ensure that the proceedings are expedited.
- d* what appeal is possible from the grant or refusal of a return application, within what time limits do appeals operate, on what grounds and subject to what limitations?
- Decisions on Hague applications can be appealed by either party within a set period of time after the judgment is delivered/signed. The party must file a Notice to Appeal, usually within 30 days of the decision. In some jurisdictions appeals can be heard within 3 months, or earlier in urgent cases. In others, it may take from 12 to 18 months.
  - After appeals to provincials to provincial Court of Appeal, leave may be sought to the Supreme Court of Canada. To date, the Supreme Court has only granted leave in and heard two cases under the Hague Child Abduction Convention.
  - For appeals in Quebec, the appellant parent has 30 days after the decision of the first instance to make notice of appeal. Then, in theory, each party

has to provide the Court with its factum and a date for a hearing can be scheduled thereafter; however, in practice, the parties will generally agree to proceed without formal factums being filed, thus allowing the Chief Justice to form a special panel of the Court to hear the appeal forthwith, in fact as soon as the parties are ready to proceed.

- 4 In what circumstances, and by what procedures/methods, will a determination be made as to whether a child objects to being returned?
- If a request for return involves an older child, the court may consider evidence as to the child's wishes/objections respecting return. For example, through a child protection worker, counsel appointed for the child, a family member, an interview with the judge in chambers and/or by the child giving evidence him/herself in open court, depending on the circumstances.
  - In Quebec, when the abducting parent is notified of the return application, a notice of motion is attached and a date given. At this hearing, the lawyer for the abducting parent will express the child's objection to being returned. Often, the parent goes along with the child's wishes or the parent's wishes are imposed on the child. In situations where the child is asked to express an opinion on being returned to the country in which he or she is habitually resident, the judge may be asked to appoint a legal aid attorney to represent the child (articles 394.1 to 394.5 of the *Code of Civil Procedure*). This step is often useful in situations where one of the parents is attempting to influence the child.
  - In what circumstances in practice will the objections of the child be held to justify a refusal to return? (Please indicate the statutory basis, if any.)
  - It is difficult to state the grounds on which a judge could justify refusing to return the child on the basis of the child's wishes since that would involve an assessment of the testimony and the child's wishes and particularly his or her maturity.
  - There is no statutory basis for a child's objections to justify a refusal to return (other than the Convention itself which is a Schedule to and forms part of the legislation). Each case is assessed on its merits.
- 5 Where the person opposing return raises any other defences under Article 13 or Article 20, what are the procedural consequences? What burden of proof rests on the defendant? Does the raising of defences under Articles 13 or 20 in practice lead to delay? What measures, if any, exist to reduce such delay to a minimum?

#### Article 13 or 20

- Manitoba has never had a Hague Convention case where an Article 13 defence was *not* raised. These defences are considered with all other issues in a request for return and have not delayed matters.
- If Article 13 is invoked in Quebec, the judge may order a psychological evaluation (articles 414 and following of the *Code of Civil Procedure*). It is understood that this evaluation will be done as soon as possible so that a decision with respect to returning the child to the country in which he or she is

habitually resident can be made as quickly as possible.

- The Article 20 defence has not been raised in any Canadian cases.

#### Procedural consequences

- There are no unique procedural requirements that apply when a defence is raised.

#### Burden of proof

- The burden of proof is the balance of probabilities.

#### Delays

- Affidavits or viva voce evidence may be required which may result in short delays for preparation time.
- To avoid subsequent delays, some CAs will request at the outset that the requesting parent consider what undertakings he/she would be prepared to abide by to ease any anticipated practical/legal objections to return.

- 6 Please specify the procedures in place in your jurisdiction to ensure that return orders are enforced promptly and effectively? Are there circumstances (apart from pending appeals) in which execution of a return order may not be effected. Do return orders require separate enforcement proceedings? Is there appeal from such proceedings? Are such enforcement procedures routinely invoked, and are they successful in achieving the enforcement of return orders?

#### Prompt and effective enforcement

- The court can include a clause in the order to enlist the assistance of the police to assist with the return of the child (ie. apprehension of the child). The child will then be turned over to the requesting parent or the Children's Aid Society.
- Parents can also agree to an undertaking for return.
- In Quebec, since the CA is always represented during Hague proceedings by a prosecutor from the office of Quebec's attorney general, judges may request the CA's assistance in enforcing return orders at any time. The judge may order the CA to co-ordinate procedures to turn the child over to the Director of Youth Protection for return to the applicant parent if the abducting parent does not wish to return with the child. The judge may also order the CA to co-ordinate the assistance of the police if necessary.
- The CA ensures that departures from Quebec are effected without incident. The CA can also co-ordinate procedures for obtaining a passport for the child from the Canadian Passport Office or from the child's national consulate or embassy.
- In Manitoba and Quebec's experience, parents normally return once their legal options have been exhausted.

#### Appeals

- Appeals can lead to the order being suspended. They are very common.

A return order could be enforced in Manitoba pursuant to *The Child Custody Enforcement Act*. These proceedings could be appealed. Police assistance/criminal charges may also come into play. Other measures to enforce orders are usually not needed.

#### Other assistance

- The "*our missing children*" program in Canada offers some assistance with travel costs and accommodation through its Travel Reunification Program for the purpose of returning children abducted from Canada back to Canada. The programme is co-ordinated by the Royal Canadian Mounted Police (RCMP) Missing Children's Registry, in cooperation with the national airlines and rail system. More information about this program is available at <http://www.ourmissingchildren.ca>.

7 Would you support any of the following recommendations?

- a* calling upon States Parties to consider the considerable advantages to be gained from a concentration of jurisdiction in a limited number of courts.<sup>7</sup>
- Canada recognises the positive experience of several countries that have concentrated jurisdiction over Hague cases to a limited number of courts and judges and that this is a principle worth promoting as an effective means for improving compliance with the Convention and greater consistency in judicial decision-making, however, Canada also acknowledges that the legal systems of many countries - including those of Canada - make this objective either difficult to achieve in practice or, indeed, might be constitutionally prohibited.
- Canada's geography and vast territory add to the challenge.
  - b* underscoring the obligation of States Parties to process return applications expeditiously, and making it clear that this obligation extends also to appeal procedures.<sup>8</sup>
- Yes.
  - c* calling upon trial and appellate courts to set and adhere to timetables that ensure the speedy determination of return applications.<sup>9</sup>
- Yes. Some Canadian jurisdictions are currently doing so through case management.

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<sup>7</sup> See, for example, Conclusion No 4 of the "De Ruwenberg II" Judicial Seminar (footnote 7, above):

"It is recognised that, in cases involving the international protection of children, considerable advantages are to be gained from a concentration of jurisdiction in a limited number of courts/tribunals. These advantages include the accumulation of experience among the Judges and practitioners concerned and the development of greater mutual confidence between legal systems."

This conclusion was supported by the judges present at the Washington Judicial Conference (footnote 7, above).

<sup>8</sup> See, for example, Conclusion No 2 of the Washington Judicial Conference:

"Prompt decision-making under the Hague Child Abduction Convention serves the best interests of children. It is the responsibility of the judiciary at both the trial and appellate levels firmly to manage the progress of return cases under the Convention. Trial and appellate courts should set and adhere to timetables that ensure the expeditious determination of Hague applications."

<sup>9</sup> See above, footnote 16.

*d* calling for firm judicial management, both at trial and appellate levels, of the progress of return applications.<sup>10</sup>

- Some jurisdictions have instituted case management in the court systems.

*e* calling upon States Parties to enforce return orders promptly and effectively.<sup>11</sup>

- Yes.

*f* recommending that the "grave risk" defence under Article 13 should be narrowly construed.<sup>12</sup>

- Interpretation issues are determined by the Canadian courts. In the *Thomson* case (*Thomson v. Thomson*, [1994] 3 SCR 551) the Canadian Supreme Court has indicated that this defence is to be narrowly construed: "The risk of harm need not come from a cause related to the return of the child to the other parent, it may arise from the removal of the child from his present caregiver: from a child centered perspective, harm is harm. If the harm is severe enough to meet the stringent test of the Convention, it is irrelevant where it arises from. However it would only be in the rarest cases that the removal of the child from the abductor and its new environment would constitute the level of harm contemplated by the Convention." (cited from INCADAT)

8 Please indicate any important developments since 1996 in your jurisdiction in the interpretation of Convention concepts, in particular the following:

- rights of custody (Article 3 *a* and Article 5 *a*);
- habitual residence (Article 3 *a* and Article 4);
- rights of access (Article 5 *b*);
- the actual exercise (of rights of custody) (Article 3 *b* and Article 13 *a*);
- the settlement of the child in its new environment (Article 12);
- consent or acquiescence to the removal or retention of the child (Article 13 *a*);
- grave risk (Article 13 *b*);
- exposure to physical or psychological harm (Article 13 *b*);
- intolerable situation (Article 13 *b*);
- fundamental principles relating to the protection of human rights and fundamental freedoms (Article 20).

Since the last Special Commission, in 1997, 17 return applications have been decided by Quebec courts. Convention concepts were interpreted in those decisions as follows:

Droit de la Famille – 3202, [1999] R.J.Q. 248 (Superior Court) (December

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<sup>10</sup> See above, footnote 16.

<sup>11</sup> See, for example, Conclusion No 4 of the Washington Judicial Conference (footnote 7, above):

"It is recommended that State parties ensure that there are simple and effective mechanisms to enforce orders for the return of children."

<sup>12</sup> See, for example, Conclusion No 5 of the Washington Judicial Conference (footnote 7, above):

"The Article 13 *b* 'grave risk' defense has generally been narrowly construed by courts in member states. It is in keeping with the objectives of the Hague Child Abduction Convention to construe the Article 13 *b* grave risk defense narrowly."

15, 1998)

**Actual exercise of custody** [Translation] “It is the opinion of this court that interpretation of the expression “actually exercising the custody rights” must take into account the fact that there may be a division of responsibilities between the parents and there is, after the separation, a division of the child’s time between them. What must be “actual” is that the two parents look after the child in their own time and in their own way, as agreed between them. The father in this case “took care” of the child when she was with him and every time it was his turn to look after her, just as he “took care” of the child when it was a matter of discussing the child’s care with the mother. He therefore exercised parental authority when the opportunity presented itself. Given that each of the parents does not have to do everything at the same time and in the same way, the court is of the opinion that this is not a case in which the father did not actually exercise his custody rights.”

**Child’s wishes** [Translation] “The court did not come to the conclusion that she has reached an age or level of maturity at which it is appropriate to take into account her wishes or preferences. It is even debatable whether she is fit to express herself validly in this regard. Furthermore, as the expert witness told us, the child does not wish to live in Quebec rather than France, but to live with the mother rather than the father. This could be in France. Under the *Act respecting the civil aspects of international and interprovincial child abduction*, it is not the responsibility of this court to decide how to grant the child’s wishes through the custody arrangements.”

Droit de la Famille – 3719, [2000] AZ-00021960 (SOQUIJ) (Superior Court) (August 31, 2000) confirmed on appeal

**Habitual residence** [Translation] “In this case, it is clear that until December 18, 1999, the children’s habitual residence was in Quebec. Their arrival with their father in England on December 18 may be considered a neutral fact in itself in that it could be viewed as either a change of habitual residence or a visit to their mother for the holiday period, depending on the agreement between the parents shown by the evidence. The situation changes after January 6, 2000. The father returns to live in Quebec. The children stay with their mother and attend school near their residence, participate in everyday activities, make friends. In short, they establish a routine; they live in England. It is revealing that the parents decided that they should wait until Easter and the school break to visit their father in Quebec.” [...] “From the point when the father left England on January 6, 2000 and chose, despite his disappointment and confusion, to implement the agreed plan, namely that the children would live with their mother and attend school in England, until he could also move there, there is reason to conclude that the children’s habitual residence was England. The court concludes on the evidence that upon their arrival in Quebec in April 2000, the children’s residence was in England. Since the evidence clearly reveals that the parties had agreed that the children were only visiting their father for a month, their failure to return on the agreed date was wrongful under the law.”

Droit de la Famille – 3713, [2000] AZ-50078393 (SOQUIJ) (Court of Appeal) (September 8, 2000) confirming the decision Droit de la Famille – 3719

**Habitual residence** “The determination of a child’s habitual residence is usually regarded simply as a question of fact to be decided by reference to all the circumstances of any particular case; the place of habitual residence of a child will be determined by focusing on the reality of the child, not that of the parents; an appreciable period of time – one of a duration necessary for the child to develop ties and to show signs of integration into his new environment – should elapse before a new habitual residence might be acquired; the child should have a real and active connection with the place of his residence; to be habitual the residence must have achieved a certain degree of continuity; there is no minimum period necessary in order to establish the acquisition of a new habitual residence.”

**(3) Issues surrounding the safe and prompt return of the child (and the custodial parent, where relevant)<sup>13</sup>**

- 1 To what extent are your courts, when considering a return application, entitled and prepared to employ “undertakings” (*i.e.* promises offered by, or required of the applicant) as a means of overcoming obstacles to the prompt return of a child? Please describe the subject-matter of undertakings required/requested. At what point in return proceedings are possible undertakings first raised, and how?

Undertakings are sometimes used by the court or by counsel to minimize the risk of harm to a child, and, where relevant to the custodial parent or, otherwise to further Hague Convention objectives pending the custody determination in the state of the child’s habitual residence.<sup>14</sup> Canada’s Supreme Court endorsed the use of undertakings in *Thomson v. Thomson*.<sup>15</sup>

The CA can suggest to requesting parents that they consider whether they would be prepared to enter into undertakings to address concerns of the court, if necessary.

- The other party will have the care of the child until a court in the requesting jurisdiction can determine the arrangements for the child’s care that meet the child’s best interests.
- The other party and the child may return to reside in the marital home and the requesting parent will reside elsewhere.
- The requesting parent will provide financial assistance to the other party and the child or, if unable to do so, will assist the other party in obtaining any state social assistance benefits that might be available to that party or the child.
- The requesting parent will exercise only reasonable access/visitation to the child upon the child’s return to the requesting country, subject to any custody/access order respecting the child pronounced by a court in that country after proper notice to the other party and an opportunity to be heard.
- The requesting parent will co-operate with and participate in counselling with the other party to improve their relationship as parents and will co-operate with and participate in any assessment respecting custody and/or access agreed to by the parties or ordered by the court in the requesting state.
- In the event the other party returns to the marital home, the requesting parent will not attend that home for any purpose other than picking up and delivering

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<sup>13</sup> The context of these questions is the experience of several States that the majority of return applications now concern (alleged) abduction by the child’s primary caretaker, and that these cases often give rise to concerns about supports available for, or even the protection of, the returning child and accompanying parent within the country to which the child is to be returned. The role played by Central Authorities in this context is covered by question 6 of section 1 of the Questionnaire.

<sup>14</sup> *Supra* note 7 at 24.

<sup>15</sup> The Court stated that the use of undertakings facilitates the objective in Article 12 to return children forthwith. (cited from INCADAT).

- the child for access periods, without the express consent of the other party. The requesting parent will co-operate with arrangements to ensure that the court in the requesting state decides the issues of custody and access without delay, unless the parties are able to resolve all the issues by mutual agreement
- The requesting parent will pay travel costs of the abducting parent and the child or of the child.
  - The requesting parent will make arrangements to provide health insurance coverage for the child/other parent.
- These undertakings are used pending the determination of custody. Some Canadian CAs include a list of possible undertakings in the information package distributed to parents or their lawyers. Of course, cooperation between States is essential to the effectiveness of these undertakings as they are not enforceable per se in the other State.
  - Although there are advantages to including undertakings to an order for the return of a child, including the earlier return of the child, there might also be difficulties associated with them. In some situations, undertakings can become too onerous for the applicant to satisfy thus causing the abducting parent to refuse, once again, to return the child to the country of habitual residence. Also, the abducting parent may have an advantage when negotiating the undertakings because he/she is in physical possession of the child.
- 2 Will your courts/authorities enforce or assist in implementing such undertakings in respect of a child returned to your jurisdiction? Is a differentiation made between undertakings by agreement among the parties and those made at the request of the court?
- Generally, the courts and authorities in Canada can only enforce undertakings that have force of law in Canada. Therefore, undertakings imposed by foreign courts or undertakings made by agreement of the parties must be recognized by the court.
  - The court may, however, take into account a party's compliance or lack of compliance with undertakings.
- 3 To what extent are your courts entitled and prepared to seek or require, or as the case may be to grant, safe harbour orders or mirror orders (advance protective orders made in the country to which the child is to be returned) to overcome obstacles to the prompt return of a child?
- Some jurisdictions noted that some courts may not feel that they have the jurisdiction to pronounce safe harbour orders or mirror orders, unless there is a pending custody proceeding. However the child welfare/protection legislation and process are very responsive to reacting to emergencies and protecting children.
- 4 Is consideration being given to the possible advantages of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, in providing a jurisdictional basis for protective measures associated with return orders (Article 7), in providing for their recognition by operation of law (Article 23), and in communicating information relevant to the protection of the child (Article 34)?
- Yes. The federal Department of Justice in collaboration with provinces and territories have undertaken a Working Group to draft a uniform implementation



act for the *Convention on the International Protection of Adults* and the *1996 Hague Convention on the Protection of Children*. This uniform act could be used by provinces and territories to implement these Conventions. This project should be completed by the summer and presented to the Uniform Conference Law of Canada conference in August.

- 5 Have you experience of cases in which questions have arisen as to the right of the child and/or the abducting parent to re-enter the country from which the child was abducted or unlawfully retained? If so, how have such issues been resolved?
- Many Canadian CAs have had no experience with this issue. Such issues are resolved on an ad hoc basis and in view of the facts of a given case.
- 6 Please comment on any issues that arise, and how these are resolved, when criminal charges are pending against the abducting parent in the country to which the child is to be returned.
- Uniform model charging guidelines have also been developed and approved by Canada's federal/provincial/territorial justice ministers in an attempt to ensure a more consistent approach to parental child abduction across all provinces and territories. Because parental child abduction cases depend on their own particular facts, the charging guidelines are general in nature. The primary goal in most abduction cases is to have the children returned to the custodial parent and for custody disputes to be resolved through the civil courts. If this can be accomplished without a criminal charge, so much the better.
  - In some cases, parental child abduction charges against the removing parent have complicated efforts to effect the return of a child because of concerns of the foreign court.
- 7 Please comment on any experience, as a requesting or as a requested State, of cases in which the deciding judge has, before determining an application for return, communicated with a judge or other authority in the requesting State and, if so, for what purposes. What procedural safeguards surround such communication?
- This has not occurred very often in Canada.
  - Although recognizing the possible benefits of this communication, many concerns were raised. For example, there are no procedural safeguards surrounding such communications, which may cause problems and, ultimately, hamper the proper functioning of the Convention. The matter of communication between judges should be thoroughly explored to maximize the advantages while eliminating the possible disadvantages.
  - On one occasion, a judge of the Superior Court of Quebec communicated by telephone with a California judge hearing divorce proceedings between the parties in California before ordering the return of the children to the United States. Apparently, the Quebec judge wanted further details 1) on the scope of an interim order made a few weeks earlier by the judge in California and 2) on the sequence of events that would take place when the children were returned to California. The file revealed that the California judge responded in writing to the questions from the Quebec judge. The return order made by the Superior Court was appealed and confirmed by the Court of Appeal (reported in [1996] R.D.F. » 512 (Superior Court) and Droit de la Famille – 2454, [1996] R.J.Q. 2509

(Court of Appeal). On another occasion, a judge in Ontario wanted information on how quickly the foreign court could hear the custody proceeding.

- 8 Has an appointment been made in your country of a judge or other person competent to act as a focus or channel for communication between judges at the international level in child abduction/access cases?<sup>16</sup>
- No.
- 9 Where a child is returned to your Country, what provisions for legal aid and advice exist to assist the accompanying parent in any subsequent legal proceedings concerning the custody or protection of the child?
- Legal aid availability is subject to financial eligibility and the merits of the case and other criteria established by provinces and territories. If Legal Aid is not available, private counsel must be retained by the party.
- 10 Where a custody order has been granted in the jurisdiction of, and in favour of, the left behind parent, is the order subject to review if the child is returned, upon application of the abducting parent?
- Yes. Custody orders are always subject to review on the basis of change in circumstances.
- 11 Would you support any of the following recommendations?
- a* that Contracting States should consider ratification of or accession to the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, to provide a basis for jurisdiction, recognition and enforcement, and co-operation in respect of measures of protection of a child which are attached to return orders.
    - YES. The Department of Justice in collaboration with provinces and territories have undertaken a Working Group to draft a uniform implementation act for the *Convention on the International Protection of Adults* and the *1996 Hague Convention on the Protection of Children*. This uniform act could be used by provinces and territories to implement these Conventions. This project should be completed by the summer and presented to the Uniform Conference Law of Canada conference in August.
  - b* that Contracting States should provide swift and accessible procedures for obtaining, in the jurisdiction to which the child is to be returned, any necessary protective measures prior to the return of the child.
    - If this sentence is intended to mean that mechanisms be in place to ensure the safety of a returning child (e.g. notifying child protection authorities in domestic violence/child protection cases) and having legislation to enable parents to apply for protective relief, yes, we support this and have such legislation in place.
  - c* that Contracting States should take measures to ensure that, save in exceptional cases, the abducting parent will be permitted to enter the

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<sup>16</sup> See footnote 23, below.

Country to which the child is returned for the purpose of taking part in legal proceedings concerning custody or protection of the child.

- This already occurs in Canada.
- d* that Contracting States should provide a rapid procedure for the review of any criminal charges arising out of a child's abduction/unlawful retention by a parent in cases where the return of the child is to be effected by judicial order or by agreement.
- Like any criminal charge, the speed by which one parental child abduction is dealt with depends on many factors. The existence of pending charge may or may not affect whether the child remains in the care of the abducting parent - custody is a matter determined by the civil courts.
- The responsibility for criminal proceedings lies with the attorney general, an institution independent of the government and the CA. Each case must be examined separately.
- e* that Contracting States should nominate a judge or other person or authority with responsibility to facilitate at the international level communications between judges or between a judge and another authority.<sup>17</sup>
- Although recognizing the possible benefits of this communication, many concerns were raised. For example, there are no procedural safeguards surrounding such communications, which may cause problems and, ultimately, hamper the proper functioning of the Convention. The matter of communication between judges should be thoroughly explored to maximize the advantages while eliminating the possible disadvantages.
- The appropriate authorities in Canada would need to be consulted.
- As well, depending on the role of the "liaison judge", there may be a need to nominate a judge in each province and territory.
- f* that the Permanent Bureau of the Hague Conference on Private

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<sup>17</sup> See, for example, Conclusion No 1 of the "De Ruwenberg I" Judicial Seminar (footnote 7, above):

"The recommendation was made that, following the example of Australia, judges attending the seminar should raise with the relevant authorities in their jurisdictions (e.g., court presidents or other officials, as appropriate within the different legal cultures) the potential usefulness of designating one or more members of the judiciary to act as a channel of communication and liaison with their national Central Authorities, with other judges within their own jurisdictions and with judges in other states, in respect, at least initially, of issues relevant to the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction."

This recommendation was endorsed in Conclusion No 5 of the "De Ruwenberg II" Judicial Seminar (footnote 7, above), as follows:

"The need for more effective methods of international judicial co-operation in respect of child protection is emphasised, as well as the necessity for direct communication between Judges in different jurisdictions in certain cases. The idea of the appointment of liaison Judges in the different jurisdictions, to act as channels of communication in international cases, is supported. Further exploration of the administrative and legal aspects of this concept should be carried out. The continued development of an international network of Judges in the field of international child protection to promote personal contacts and the exchange of information is also supported."

This conclusion was in turn endorsed at the Washington Judicial Conference (footnote 7, above).

Liaison judges have already been appointed for England and Wales, Australia, New Zealand, Hong Kong and Cyprus.

International Law should continue to explore practical mechanisms for facilitating direct judicial communications, taking into account the administrative and legal aspects of this development.

- YES. In addition, Canada encourages all States to consider funding the Hague Children's Project. The goals and objectives of the Project address and offer practical solutions to many of the concerns raised by the questionnaire.

**(4) Procedures for securing cross-frontier access/contact between parent and child<sup>18</sup>**

1 What provisions for legal aid/advice/representation in respect of a foreign applicant for an access order exist in your jurisdiction?

- In most jurisdictions, legal aid is available for foreign parents seeking to establish/enforce an access order, depending on financial eligibility and the circumstances (merits) of the case. Legal aid is not available for access applications in Ontario. CAs can provide the parent with a list of lawyers who specialize in family law and international law and facilitate contact with their jurisdiction's Legal Aid program.
- In New Brunswick, legal advice and representation is provided free of charge by the Attorney General of New Brunswick through the services of Crown counsel in the Department of Justice.

2 On what basis do your courts at present exercise jurisdiction to:

- a* grant and
- b* modify access/contact orders?

- Usually, the court will exercise jurisdiction to grant and modify access orders if the child is habitually resident in that province, if it is necessary (ie. immediate safety concerns) or the parties submit to the jurisdiction. Custody orders are always subject to review on the basis of change in circumstances. The "best interests of the child" is the guiding principle in custody and access cases.

3 What provisions exist for the recognition and enforcement in your jurisdiction of foreign access orders, in particular where the order has been made by a court or other authority of the country of the child's habitual residence? In this context is consideration being given to implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*?

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<sup>18</sup> The role played by Central Authorities in this context is covered by question 7 of section 1 of the Questionnaire. In answering these questions please distinguish where appropriate between:

- a* applications pending return proceedings;
- b* applications following a refusal to return a child;
- c* applications not made in connection with other proceedings; and
- d* applications to modify existing access orders.

Please note also that the term "access" should be read as including all forms of contact.

- Canadian jurisdictions have legislation pursuant to which a parent can seek to have a foreign access (or custody) order recognized. The parent would apply for access enforcement remedies under provincial legislation.

The Department of Justice in collaboration with provinces and territories have undertaken a Working Group to draft a uniform implementation act for the *Convention on the International Protection of Adults* and the *1996 Hague Convention on the Protection of Children*. This uniform act could be used by provinces and territories to implement these Conventions. This project should be completed by the summer and presented to the Uniform Conference Law of Canada conference in August.

4 What, if any, provision exists to ensure that cross-frontier access applications (including appeals) are processed expeditiously?

- There are no special rules applicable to cross-frontier access cases. As in any case, the court can expedite the hearing of a matter it considers urgent.

5 What facilities/procedures are in place to promote agreement between parents in international access/contact cases?

- In the case of requests for protection of access rights, the Quebec CA will send a letter to the parent refusing to send the child to the applicant parent for the exercise of access rights. They often contact the parent by telephone and try to convince him or her to send the child to visit the other parent as provided under the foreign or domestic decision.

- In the case of a request for organization of access rights, with the Quebec CA may contact parents, either in writing or by telephone, and try to negotiate an amicable settlement. Sometimes we have even drawn up a draft agreement for the parents.

- In other cases, CAs will refer the applicant parent to legal aid or a private lawyer. The CA's intervention will be limited to acting as an *amicus curiae* (friend of the court) and monitoring proceedings if necessary.

- Some CAs also promote the use of conciliation services. For example, the Family Conciliation Services, within the Manitoba's Department of Family Services, offers free mediation, a parent education program and conciliation counselling to parents (including foreign parents) in Manitoba. Family Conciliation is part of the International Social Services network of agencies and from time to time becomes involved in cases where one parent is outside of Manitoba.

- If a case is before the Family Division of the Court of Queen's Bench in Manitoba, the Division's case management/pre-trial mechanisms can assist parents to reach an agreement on access/contact (or custody and other family law issues).

- ISS and Consular Affaires at the Department of Foreign Affairs can also be of great assistance.

6 Do your courts in practice accept a presumption in favour of allowing access/contact to the non-custodial parent?

- The provincial and territorial legislation does not contain a presumption of contact as such. The best interests of the child is the "paramount consideration" in access and custody cases. However, there are provisions recognizing the importance of parents being involved with their children.

Indeed in Manitoba and a number of other provinces, where parents cohabit after the birth of their child, regardless of their marital status, their rights of custody respecting the child are joint unless the court orders otherwise.

- Quebec civil law recognizes the right of parents to exercise their parental authority equally. It is clear that children are entitled to have access to both their father and their mother. Of course, a court hearing an access application must act in the best interests of the child.
- 7 What conditions are likely to be imposed on access in respect of a non-custodial abducting parent?
- surrender of passport/travel documents
  - supervised access, time-limited access or no access until the court has made a final decision on custody and access, or on an ongoing basis.
  - posting of a bond to ensure the child's return from vacations abroad
  - registration of the child with the embassy or consulate in question.
  - request that foreign consulates and embassies not issue new passports or travel documents for the child if the parent does not have custody or the right to leave Canada
  - the access order or access agreement indicate the competent court to modify any custody or access arrangements
- 8 What information concerning services and what other facilities are available to overseas applicants for access/contact orders?
- Relevant information can be obtained by contacting the CA of the province or territory.
  - In addition, Manitoba Justice can provide the parent with their free public information booklet, *Family Law in Manitoba, 1999*, which describes all aspects of family law and services in the province; provide information about accessing Legal Aid, lawyer referral services, public legal information services, etc. The booklet can be accessed at: <http://www.gov.mb.ca/justice/family/family.htm>
  - Quebec has included such information on their web site at [www.justice.gouv.qc.ca](http://www.justice.gouv.qc.ca)
- 9 What problems have you experienced and what procedures exist in your country as regards co-operation with other jurisdictions in respect of:
- a* the effective exercise of rights of access in your/in the other jurisdiction;
    - In one instance, the foreign authorities attempted to protect access rights in Quebec by requesting the assistance of social services in the foreign country to determine the child's reasons for objecting. In principle, the CA in Quebec believes that this was a very good initiative. However, the meeting took place in the presence of the father, who could have manipulated the child to discourage him from visiting his mother in Quebec. This evaluation was also done without consulting the applicant parent to obtain her version of the facts.
  - b* the granting or maintaining of access rights to a parent residing abroad/in your jurisdiction;
    - In one case, despite a court order that steps be taken to re-establish ties between the children and their father, no follow-up action was taken

by the social services in the foreign jurisdiction claiming that the children objected to such actions.

- Regardless of allegations of spousal abuse, the foreign court granted custody to the abusing parent forcing the mother to visit her children in an unsafe environment.
- In some countries, prosecutors represent the applicant parent in proceedings with respect to the organization and protection of access rights. The fact that there is no direct link between the parent and the prosecutor makes things more difficult and leads to delays.
- c the restriction or termination of access rights to a parent residing abroad/in your jurisdiction.

To date, most of the Canadian CAs have had no experience with this issue.

10 What, if any, measures are available to your courts to help guarantee adherence by parents to access conditions (e.g. financial guarantees, surrender of passports)?

- surrender of passport/travel documents
- supervised access, time-limited access or no access until the court has made a final decision on custody and access, or on an ongoing basis.
- posting of a bond to ensure the child's return from vacations abroad
- request that foreign consulates and embassies not issue new passports or travel documents for the child if the parent does not have custody or the right to leave Canada
- the access order or access agreement indicate the competent court to modify any custody or access arrangements
  
- restitution of expenses for the wronged parent
- compensatory access recognition of custody and access orders abroad
- transitory measures which are in a child's best interests

A variety of enforcement options are available pursuant to Manitoba's *Child Custody Enforcement Act*, including:

- peace officer or other agency assistance to locate, apprehend and deliver a child to a specific person;
- transfer of property to a trustee;
- payment of support to a trustee;
- posting of bonds, with or without sureties;
- delivery of passports and travel documents to the court.

11 How in practice are access orders enforced?

- A domestic access order may be enforced through civil contempt proceedings. Every order is binding. A parent may apply to the civil court for the enforcement of an access order, regardless of where the order was pronounced. Parents who fail to comply with the Canadian orders may be charged with an offence under provincial legislation or the Criminal Code, although this does not often occur.

12 Would you support recommendations in respect of any of the particular issues raised in the preceding questions? If so, please specify.

- We would be interested in hearing about (and considering) innovative access enforcement mechanisms in other jurisdictions.
- Mediation would contribute to resolving problems with access rights to the extent that both parties are prepared to negotiate and respect the agreement reached.

**(5) Securing State compliance with Convention obligations**

- 1 Please comment upon any serious problems of non-compliance with Convention obligations of which your authorities have knowledge or experience and which have affected the proper functioning of the Convention.

In some cases, the following problems with non-compliance have been noted by the Canadian CAs:

- judges declining to return abducted children on the basis of Article 13 of the Convention when there was no justification to use this Article;
  - in some countries, cases take an inordinate amount of time to work their way through the courts and the various levels of appeal;
  - another country has yet to pass the domestic legislation necessary to make Hague Convention decisions legally enforceable; and even once such legislation is in place, it is questionable whether enforcement actually will take place;
  - in some countries, the penalties for ignoring orders for return of the child are inconsequential;
  - courts take so long to deal with Hague Convention cases that they end up using their own delays as a basis to rule that it is in the best interests of the child to remain in that country;
  - the delays for enforcement of an order can be over a year and a half;
  - little or no understanding of or agreement about the responsibilities of the various local authorities, the CA, the courts, the prosecutor and the police to ensure the return of abducted children; indeed, there is little or no understanding or agreement that abducted children should be returned, the Hague Convention notwithstanding;
  - lack of mechanism available to enforce an order for the return of a child;
  - lack of experience of the judiciary or of attorneys with Hague Convention cases and obligations arising from this international convention;
  - the active involvement of the Canadian Embassies is essential to obtain even the slightest movement on Hague Convention cases in some countries.
- 2 What measures, if any, do your authorities take, before deciding whether or not to accept a new accession (under Article 38), to satisfy themselves that the newly acceding State is in a position to comply with Convention obligations?

The Department of Justice and the Federal CA coordinate the process. Background information and an assessment of whether the proposed accession should be accepted is requested from geographic, legal and consular areas of the Department of Foreign Affairs and International Trade (DFAIT). This information is provided to provincial/territorial CAs for their information and comments. Information collected includes:

- updated background material on the newly acceding countries;



- any experience DFAIT has in matters involving children and child abduction in particular with the proposed acceding country;
- updated information sheets, if existing, issued to travelers to these countries;
- information on the legal systems of these countries and on legislation relating to the protection of children generally.

3 Would you favour the drawing up of a standard questionnaire to be submitted by Contracting States to each newly acceding State with a view to assisting them to decide whether or not to accept the accession? What questions would you include?

- Canada could see such a proposal as being useful if it requested routine information from newly acceding countries on how each proposes to meet the obligations of the Hague Convention, such as: information relating to implementing legislation, available social services and child protection systems, proposed operation of CAs, likely passage of cases through the domestic court system, contact numbers etc.
- This, if coupled with explanatory “best practices” information provided as a result of this Special Commission and other relevant meetings (and which could be made available through the Permanent Bureau) could assist newly acceding States to consider the implementation and operation of the Convention at an earlier stage and in a more comprehensive manner.

Canada considers such information gathering and information sharing, particularly on the operational aspects of how countries implement the Convention, as potentially being very useful. For example, such information could be used by the courts to determine whether to permit family members to travel to particular (non-compliant) countries, and under what conditions. On the other hand, the educative benefits of sharing practical experience might also lead to improved compliance by countries, both administratively or judicially.

4 Are you in favour of an increase in the number of Special Commissions<sup>19</sup> (or similar meetings) to review the practical operation of the Convention? Would you also favour the idea that additional Special Commissions should review particular aspects of the operation of the Convention (for example, the problems surrounding the protection of rights of access, or the issues that arise when allegations of abuse or domestic violence are raised in return proceedings or the practical and procedural issues surrounding direct communications between judges at the international level, or the enforcement of return orders by Contracting States)?

- Yes, as well as international seminars on Hague Convention issues, for example, operational seminars on the recommendations of the 4<sup>th</sup> Special Commission could be useful means of implementing agreed conclusions/recommendations.

5 Are there any other measures or mechanisms which you would recommend:

- a* to improve the monitoring of the operation of the Convention;
- b* to assist States in meeting their Convention obligations;

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<sup>19</sup> All other things being equal, the approximate additional expenses arising for the annual budget of the Hague Conference would amount to Dfl. 30,000 (for an additional Commission of 3 days every 2 years), or Dfl. 20,000 (every 3 years).

*c* to evaluate whether serious violations of Convention obligations have occurred?

- See above suggestions.
- Canada encourages all States to consider funding the Hague Children's Project. The goals and objectives of the Project address and offer practical solutions to many of the concerns raised by the questionnaire. We commend the Permanent Bureau for the development of the INCADAT database.

## **(6) Miscellaneous and general**

1 Have you any comments or suggestions concerning the activities in which the Permanent Bureau engages to assist in the effective functioning of the Convention, and on the funding of such activities?<sup>20</sup>

- The Permanent Bureau and the Hague Conference web site are an excellent source for information relating to the practical operation of the Convention (ie. INCADAT). The Permanent Bureau's coordinating role is acknowledged and as a locus for information on any agreed "best practices" should be encouraged. More information could be included on the web site.
- Again, Canada encourages all States to consider funding the Hague Children's Project. It addressed many of the concerns noted with the operations of the Convention.

2 Are there any additional ways in which the Permanent Bureau might provide assistance? Do you favour the preparation of a list of potential Permanent Bureau functions and tasks that could only be performed if the Permanent Bureau were to receive additional financial and human resources either through approval of an increased budget or through voluntary contributions to accounts set aside for that purpose?

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<sup>20</sup> The present activities of the Permanent Bureau fall into the following categories:

- a* assisting in the maintenance of good communications between Central Authorities, by inter alia seeking and disseminating (through the Hague Conference website and other means) reliable contact data;
- b* giving informal advice and assistance to Central Authorities and others on matters of interpretation and procedure under the Convention;
- c* drawing the attention of States Parties to, and offering advice about, situations in which obstacles have arisen to the proper functioning of the Convention;
- d* offering advice of a general nature and referrals in individual cases;
- e* advising Contracting States in relation to implementation of the Convention;
- f* organising and supporting training conferences and seminars for judges, Central Authority personnel and practitioners;
- g* gathering and evaluating statistics;
- h* maintaining INCADAT (the international child abduction database of judicial decisions, available at: [www.incadat.com](http://www.incadat.com));
- i* undertaking preparation and research for the regular periodic reviews of the Convention;
- j* the publication of a judicial newsletter as a step towards building an international judicial network;
- k* encouraging wider ratification of the Convention.

With respect to many of these activities, no provision is made in the regular budget of the Hague Conference. They therefore depend largely or entirely on extra budgetary funding.

- YES.
  - The Permanent Bureau might collect information about relevant resources available in contracting states and respecting the legal systems in those states. It could also post national statistics on its web site.
- 3 Would you favour a recommendation that States Parties should, on a regular annual basis, make returns of statistics concerning the operation of the Convention on the standard forms established by the Permanent Bureau, and that these statistics should be collated and made public (for example on the Hague Conference website) on an annual basis?
- YES. Any statistics provided to the Permanent Bureau could also be posted on the Hague Conference web site as they would have already met any restrictions relating to privacy.
  - See Canada's comments on the forms for the statistics.
- 4 Would you favour a recommendation supporting the holding of more judicial and other seminars, both national and international, on the subject-matter of the Convention?
- YES. The participation of practitioners should also be encouraged.
- 5 Are there any particular measures which you would favour to promote further ratifications of and accessions to the Convention?
- Canada's policy has been one of encouraging new accessions to the Convention. DFAIT has regularly requested missions to make representations to a range of countries encouraging them to become party to the Convention. A major set of representations were made during 1999 with some follow-up this year in key countries. This policy is consistent with the recommendation of a Canadian Parliamentary Report (the *Fourth Report of the Standing Committee on Foreign Affairs and International Trade on International Child Abduction, 1998*) that the Government of Canada widen the network of countries that are signatories to the Hague Convention and the Canadian Government commitment in its response to the Report to promote the Convention at every possible opportunity.
  - From the experience of Canadian consular officers both in Ottawa and across a wide range of missions, the Hague Convention, even when it is not complied with by countries in a timely or comprehensive manner, provides consular officers with at least some tools with which to pursue cases.
  - Canada continues to support strongly efforts to encourage further ratifications of and accessions to the Convention. Canada agrees that greater awareness of the obligations of the Convention could improve the implementation of these obligations by newly acceding countries. Canada considers that the positive experience of judicial education through such events as judicial seminars and related types of assistance to newly acceding countries are other initiatives worth pursuing more vigorously. Similar efforts should be made for administrative elements, such as CAs, in order to acquire "best practice" skills and procedures.

- 6 Please provide information concerning any bilateral arrangements made with non-Hague States with a view to achieving all or any of the objectives set out in Article 1 of the Convention.

Encouraging countries to become party to the *Hague Convention on the Civil Aspects of International Child Abduction* remains Canada's preferred way of managing child abduction matters. However, given the well-known concerns that several countries have with the *Hague Convention*, particularly those countries in which family matters are determined in accordance with Sharia law, Canada decided that negotiation of relevant bilateral agreements may be another effective means of dealing with these cases. The need for Canada to explore new options is high as Canada has many dual-national families where the parents have close ties to or nationality of various Islamic countries in the Middle East.

Canada has negotiated two bilateral agreements to date, with Egypt and Lebanon. Canada will possibly negotiate a bilateral agreement with Jordan in the near future.

- (i) *Agreement between the Government of Canada and the Government of the Arab Republic of Egypt regarding Cooperation on Consular Elements of Family Matters.* This agreement, signed on November 10, 1997, entered into force on October 1, 1999.
  - (ii) *Agreement between the Government of Canada and the Government of the Lebanese Republic Regarding Cooperation of a Humanitarian Nature.* This Agreement was signed on 13 April 2000 and should enter into force soon.
- Canada hopes that these bilateral agreements will be an effective tools in seeking to prevent, resolve or reduce the difficulties that arise in international child abduction and related family welfare cases between these countries and Canada.
  - The joint consultative commission, which is the centrepiece for the agreements recently concluded with Egypt and Lebanon, is designed as a means of discussing and managing these types of case, as well as other types of consular case, taking the requirements and perspectives of both countries into account. It could, for example, be a means to maintain contact between a left-behind parent and his or her children in a safe and secure environment. It could also be an effective channel of communication between parents which, over time, might result in voluntary resolution of cases. The agreements do not contain any legal enforcement mechanisms. Canada does not yet have any direct experience of managing cases under these agreements as the joint consultative commissions are still in the process of being established.

- 7 Do you have any comments on the following proposition:

*"Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Hague Child Abduction Convention was drafted. Courts should be aware that highly restrictive approaches to relocation can adversely affect the operation of the Hague Child Abduction Convention."*<sup>21</sup>

Canadian courts increasingly faced with this issue. No trend in the caselaw has developed on the approach to relocation.

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<sup>21</sup> Conclusion No 9 of the Washington Judicial Conference (footnote 7, above). A "relocation" case is one in which a custodial parent applies to a court for permission to move permanently, together with the child, to a new country.