

THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Memorandum by the Government of Canada

At the Senior Officials' Meeting held in London in January 1986, Canada agreed to prepare a brief paper on the Hague Convention on the Civil Aspects of International Child Abduction in the light of its experience under that Convention.

2. Canada ratified in June 1983 the Hague Convention on the Civil Aspects of International Child Abduction, making use of a federal State clause. The Convention was initially extended to four provinces. It is now in force in eight of the ten Canadian provinces and the Yukon Territory. It should be extended to the Province of Saskatchewan very soon. Consequently, the only Canadian jurisdictions having yet to adopt the Convention are the province of Alberta and the Northwest Territories.

3. On the international level, it is in force amongst Canada, France, Portugal and Switzerland and it will come into force on August 1, 1986 in the United Kingdom. Hungary has recently acceded to it. President Reagan referred the Convention to the United States Senate in October of last year. There is a possibility that the United States will be in a position to ratify it at the beginning of next year.

4. Domestically as well as internationally, the violation of custody rights has been a subject of concern in Canada for the past several years. A great number of measures have been taken, including important legislative ones at both the federal and provincial levels, to ensure that children are provided with effective protection against disruptions in their lives which necessarily occur when they are abducted. As noted by the Commonwealth Law Ministers in April/May 1980, the paramount consideration in this area is the best interests of children.

5. That principle is the basis of the Hague Convention on the Civil Aspects of International Child Abduction which provides a frame work that should enable States to effectively deal with transborder abductions.

6. The task of commenting on the Convention is greatly facilitated by the fact that there already exists excellent analysis of the convention. Suffice it to mention two of these. The first is the official report of the Hague Conference which thoroughly explains the background to the Convention and its provisions. It was prepared by Elisa Perez-Vera who was the Rapporteur Special throughout the negotiations of the Convention. This document is readily available from the Hague Conference on Private International Law. The second is the explanatory documentation prepared for the Commonwealth jurisdictions by Mr. J. M. Eekelaar. It is one of a series of "accession kits" published by the Commonwealth Secretariat. Mr. Eekelaar makes a very useful analysis of the practical implications of the Convention and the draft Model Act attached to his report will surely assist all States contemplating implementing legislation. Canada would like to commend Professor Eekelaar and the Commonwealth Secretariat for this very useful work.

7. This paper will comment on the Convention, in light of Canada's analysis of the Convention and its limited experience. Although the Convention has been in force since 1983,

there have been very few cases where it has been invoked in Canadian practice, probably because there are only three other Contracting States and because the Convention does not apply to abductions which occurred before its coming into force (Article 35).

Approach taken by the drafters of the convention

8. The drafters of the Convention considered that the situation they were addressing was as follows: a custodial parent faced with the abduction of his or her child (sometimes children) to another State usually faces two problems: a factual one (locating the child) and a legal one (ensuring the respect of his or her custody right).

9. The parent does not always know to which State the child has been abducted, but even when the State where the child is located is known, the custodial parent usually does not know how to obtain the cooperation of the local authorities, if that is at all possible. Traditionally, authorities in many States, including Canada, have been reluctant to intervene in such matters. (It seems, however, that in several States, including Canada, this attitude is changing.) It was, therefore, considered important to provide assistance to the parent in locating the child.

10. The mechanism provided in the Convention to this end is the Central Authority. The duties of the Central Authority, which include taking appropriate measures to discover the whereabouts of the child, are defined in Article 7. It must be remembered that this Convention is an administrative as well as a judicial cooperation Convention. It is basically seen as a framework to encourage international cooperation. For such a practical problem as international child abduction, all involved will have to adopt a flexible approach towards the application of the Convention.

11. The second problem was ensuring respect of custody orders. The traditional legal mechanism, recognition and enforcement of judgments, could be long and a successful outcome was far from assured. This was due in part to the length of the procedure, at the end of which it was often considered that the child was too well established in his or her new environment to be displaced once again.

12. Consequently, the traditional approach to providing for the respect of custody rights was rejected for the purpose of the Convention. Instead, Article 12 prescribes that the judge must order the return of the child if there has been a wrongful removal or retention in terms of Article 3. There is, of course, a time consideration (1 year) and a party opposing the return may do so within the limits of Article 13. These exceptions to the return of the child, for example, if the return would place the child in an intolerable situation, are drafted restrictively in an effort to limit the circumstances in which the child will not be returned. In light of the Convention's stated objectives, it will be important that authorities interpret restrictively the exceptions of Article 13.

13. The same comment applies to Article 20 which provides that the return may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. This clause was adopted after a long and difficult debate to prevent the inclusion of a provision on public policy which would have allowed Contracting States to oppose the return of the child where this would be considered incompatible with the fundamental principles of the requested State relating to family and to children. This provision which was far too broad (it opened the door to a reconsideration of the merits of the custody order), risked seriously compromising the success of the Convention's. All the delegations agreed that Article 20 should be allowed to apply only exceptionally and in rare circumstances. It would seem important that when

adopting the Convention, States do not attempt to broaden the possible scope of Article 20 or even identify specific circumstances for its possible application in order not to encourage the use of this Article.

14. Mr Eekelaar states on page 19 of his report that:

"It is significant that none of these grounds for refusal is equivalent to a simple finding 'that to return the child would be contrary to the child's best interests'. To have permitted a ground of this nature to justify refusal to return the child would have opened the way to an examination of the merits of the dispute between the adult parties and thus undermined the foundations of the Convention."

This is an important statement which stresses that States will no longer permit forum shopping and thereby encourage abductions. By doing this, States take the children's side, i.e. the right of children to be protected against disruptions in their lives which occur when a custody order is violated by one parent. Such an approach counters the argument that by intervening in child abduction cases the State is taking sides in what is seen as a private matter. Protecting children can surely be seen as a question of public policy.

Implementation of the Convention by Canada

15. Comments on the implementation of the Convention in Canada could be useful for other States, especially in light of certain of the issues raised by Mr. Eekelaar.

16. As mentioned above, ten of the twelve Canadian jurisdictions have now adopted the necessary implementing legislation. In all of these cases, the implementing Act was quickly passed by the Legislatures with only favourable comments. Essentially, the Canadian jurisdictions adopted the text of the Convention. In a few jurisdictions, such as Quebec, the text was either re-arranged or a few provisions were added to it. This method was recommended by the Uniform Law Conference of Canada to ensure that the Convention itself has the force of law in Canada. A few regulations were adopted to complement the Convention but it is important that the procedure be as clear and uncomplicated as possible to ensure that the applicant can proceed rapidly.

17. Each jurisdiction has designated its Attorney General as Central Authority and has appointed a person to represent the Attorney General. Requests under the Convention can be made either to the Federal Central Authority or to the relevant Provincial or Territorial Central Authority. Provincial Central Authorities have played a significant role in processing requests received from Foreign Central Authorities or in assisting parents in making a request to a Foreign Central Authority. Their involvement is essential inasmuch as they can have direct access to other services that may be required, such as the different provincial departments or social services, child welfare, official guardians and, of course, the police departments. The role of the police is likely to become important in determining the whereabouts of children. In most of the cases that we have dealt with under the Convention, there was sufficient information to find the children. The role of the police where no such information is available remains to be defined. Decisions will also have to be made with respect to the disclosure of information on the whereabouts of the children once it is obtained. Should the address be communicated to the Foreign Central Authority? If so, under what conditions?

18. On the basis of our limited experience, we have found it useful to have the applicant parent or someone on his or her behalf take charge of the child in the requested State when the child is to return to Canada and are informing applicants accordingly. Foreign

authorities in those countries should not systematically be relied upon to take care of the child. Canadian embassies abroad have cooperated in cases of international child abduction. This, however, must be done taking into account limited resources and their diplomatic status. They cannot replace the parent and there is a limit to the kind of interventions they can make with foreign authorities.

19. When ratifying the Convention, Canada declared that, except for the Province of Manitoba, it will provide legal aid and counsel to foreign applicants insofar as they qualify under the legal aid system of the jurisdiction involved. In Manitoba, the Attorney General is prepared to represent the custodial parent whether he or she lives in Canada or abroad. In the few cases that have gone to court in Canada under the Convention, the provincial jurisdiction involved provided a lawyer to represent the child in court as Professor Eekelaar suggests in page 12 of his report. On the other hand, the parent who submitted the application was often advised by the Provincial Central Authority to retain the services of a local lawyer in private practice and was informed that he could obtain legal aid if he was eligible. Canada does not pay for the costs, including travel expenses, involved in the return of a child from Canada to the requesting State. In a successful case of the return of a child from a requested State to Canada, the custodial parent made all the necessary arrangements for the travel of her child.

20. It should also be noted that in Canada, the Convention is applied on a basis of reciprocity: it only applies to cases involving children habitually residing in another Contracting State.

21. The language of communication in the international context will always raise difficult questions. Clarifications with other Contracting States have already been necessary. Under the Convention, the matter is governed by Article 24 which states that:

"any application, communication, or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English".

A Contracting State may object to the use of French or English, but not both. This provision governs the language of any documents sent to the Central Authority. In most States, an application to the Central Authority in either English or French will probably be entertained.

22. In any event, the determining factor on this question of translation remains the possibility that the documents may have to be used in relation to an application to the court of the requested State. It cannot be assumed that a foreign judge will either accept or understand the document written in what is for him a foreign language. Consequently, we are advising any applicant in Canada that he or she should provide a translation of at least the documents on which the custody rights are based.

23. We also tell applicants that, although the Convention does not require that the application be accompanied by documents or that judicial decisions or agreements between the parties attesting to the right of custody accompany the application, they would be well advised, if the judicial authority of the requested State is required to consider their application, to append all the necessary documents in order to expedite the process by preparing a complete file for the court in advance. Article 15 enables the judicial or administrative authorities of the requested State to ask that the applicant obtain from the authorities of the State of the habitual residence of the child a decision that the removal or retention of the child was wrongful within the meaning of Article 3 of the Convention. In

view of the difficulties of obtaining such a determination on the original application, we would hope that the procedure would be used in exceptional cases.

24. Finally, the most difficult point in relation with the Convention has been up to now the exercise of access rights. It seemed important during the negotiations of the Convention that a provision on access rights be included. The access right is the counterpart to the custody right and the child has a right to be able to establish a relationship with both his parents. Unfortunately, sending a child to a foreign country for the exercise of access rights may often result in abduction, insofar as the child does not come back at the end of the stated period. This seems to occur more frequently where the parents are in different States, particularly where the access periods are few and far between and the access parent believes that he or she will not see the child again.

25. Canadian judges have ordered the custodial parent to send the child to a foreign jurisdiction for the exercise of access rights. In some cases, however, where there has been a previous abduction or evidence of non-cooperative behaviour on the part of the access parent, Canadian judges have ordered that the exercise of access rights take place only within the jurisdiction of the custodial parent. It is hoped that enhanced cooperation between authorities of the different States will ensure that the children do return after the exercise of access rights and reassure the access parent that he or she will be able to effectively exercise their rights.