Conflict of Laws Conventions and their Reception in National Legal Systems

Report for Canada (Common Law)

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A. INTRODUCTION

Although Canada has been an active participant in the Hague Conference on Private International Law since 1968,[1] and has taken part in CIDIP-V in 1994 and CIDIP-VI in 2002 under the aegis of the Organization of American States,[2] Canada is as yet a party to only four Hague Conventions and none of the CIDIP conventions.

Undoubtedly part of the reason for this is the Canadian constitutional position that private law, with few exceptions, is a matter under the legislative authority of the provinces. The federal government has the power to enter into treaties on behalf of Canada, but Canada follows the British constitutional rule that to become part of the domestic legal system treaties must be implemented by legislation. Seventy years ago it was decided by the Judicial Committee of the Privy Council in London, then Canada's court of final appeal, that the division of legislative power between the provincial legislatures and the federal Parliament applies to treaty implementation as fully as it does to other forms of legislation. Otherwise the provincial control over any particular legislative subject-matter could be subverted by the federal decision to enter into a treaty.[3] As a result of this constitutional

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1 Activities and Priorities of the Department of Justice in Private International Law, Report of the Department of Justice Canada to the Uniform Law Conference of Canada, Civil Section (Aug. 2008) at ¶ 17. The report is available online: Uniform Law Conference of Canada, www.ulcc.ca/en/poam2/ZDOJ Annual Report on Activities.pdf.

2 Ibid. at ¶ 29.

3 Attorney General for Canada v. Attorney General for Ontario, [1937] A.C. 326 (P.C.). The decision still stands, despite hints by individual judges in the Supreme Court of Canada that the decision should be reviewed, as in MacDonald v. Vapor Canada Ltd., [1977] 2 S.C.R. 134 at 168-69, 66 D.L.R. (3d) 1 at 28-29. See Peter W. Hogg, Constitutional Law of Canada, 5th ed. supplemented (Scarborough, Ont.: Thomson Carswell, 2007-) (looseleaf) at 11-11 – 11-18. .

principle, any treaty provisions that deal with private law must be implemented by provincial legislation, except for the few private law areas, such as maritime law and intellectual property, that fall under federal legislative authority.

Where the treaty includes a federal state clause permitting a state party to designate sub-units of the state within which the treaty will apply, the treaty can be implemented by the provinces one by one.[4] Where the treaty has no such clause, all the jurisdictions in Canada must pass implementing legislation, calling for a degree of coordinated legislative will that has often proved difficult to achieve.

A body that has played a large role in fostering the coordinated implementation of international conventions (not just on conflict of laws) throughout Canada is the Uniform Law Conference of Canada.[5] Its members are, in part, drawn from the ministry of justice or the ministry of the attorney-general of each province and territory and of the federal government. However, the statutes it promulgates have no official status. It is up to each Canadian jurisdiction whether it wishes to adopt the statute and, if so, whether it wishes to deviate from the model the Conference has put forward. The Conference has prepared uniform statutes to implement three of the four Hague Conventions to which Canada is a party,[6] as well as two Hague Conventions that are not yet in force and to which Canada is not yet a party.[7] These model statutes, with some modifications, have been adopted as the implementing legislation in each common law province and territory that has given effect to the relevant convention.

B. Conflict of Laws Conventions Other Than Hague and CIDIP Conventions

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[4] As has been done, for example, with the Hague Convention on the Law Applicable to Trusts and on their Recognition, which is law in some common law provinces but not all. See the Table of Implementing Legislation in Appendix A.

[5] See the Uniform Law Conference of Canada's website, online: www.ulcc.ca. Its work overall is described in Arthur Close, "The Uniform Law Conference and the Harmonization of Law in Canada" (2007), 40 U.B.C.L. Rev. 535-58; its work in treaty implementation legislation is mentioned at n. 44. See also Gérald Goldstein, "L'expérience canadienne en matière d'uniformisation, d'harmonisation et de coordination des droits" (1998), 32 Rev. Jur. Thémis 235.

[6] International Child Abduction Act (promulgated 1981) for the Hague Convention on the Civil Aspects of International Child Abduction; Intercountry Adoption (Hague Convention) Act (1993) for the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption; and International Trusts Act (1987) for the Hague Convention on the Law Applicable to Trusts and on their Recognition.

[7] International Protection of Adults (Hague Convention) Implementation Act (promulgated 2001); Parental Responsibility and Measures for the Protection of Children (Hague Convention) Act (2001).

1. Uniform law conventions

Although they are not strictly speaking conflict of laws conventions, it is worth noting here that Canada, or at least jurisdictions within Canada, have adopted a considerable number of international conventions or model laws aimed at harmonizing the laws of states in a particular area. The most notable examples are the United Nations Convention on Contracts for the International Sale of Goods, the New York Convention on the Recognition and Enforcement of Arbitral Awards, and the UNCITRAL Model Law on International Commercial Arbitration, each of which is in force in all Canadian jurisdictions.[8] Since both the United Nations Sale of Goods Convention and arbitration are the subject of other panels at this conference, no more will be said here about the Canadian implementation of these international instruments. The UNIDROIT Convention on the Form of an International Will is also law in eight Canadian common law provinces and territories.[9]

2. Bilateral conflict of laws conventions

The one bilateral conflict of laws convention that is in force is the Canada-United Kingdom Convention on Recognition and Enforcement of Judgments in Civil and Commercial Matters, which entered into force for Canada in 1987. It has been implemented by legislation for the federal jurisdiction and all the common law provinces and territories.[10] It was undoubtedly designed to take advantage of article 59 of the Brussels Convention, which governed jurisdiction and enforcement of judgments as among the member states of the European Community. Article 59 was designed to mitigate the combined effect of two other rules in the convention. One was that a member state could take jurisdiction over a person domiciled in a non-member state (Canada, for instance) on the basis of an "exorbitant" ground of jurisdiction that was not available as against defendants domiciled in member states.[11] The other was that if judgment was given against the domiciliary of the non-member state, that judgment could be enforced against the judgment debtor throughout

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8 See the Table of Implementing Legislation, app. A.

9 See Activities and Priorities of the Department of Justice in Private International Law, Report of the Department of Justice Canada to the Uniform Law Conference of Canada, Civil Section (Aug. 2008) (online: Uniform Law Conference of Canada, www.ulcc.ca/en/poam2/ZDOJ Annual Report on Activities.pdf) at para. 185.

10 See the Table of Implementing Legislation, app. A.

11 These exorbitant grounds were specifically set out in art. 3, para. 2.

the European Community by virtue of the obligation to recognize all member-state judgments. Article 59 permitted member states to refuse to enforce such judgments from elsewhere in the Community based on "exorbitant" jurisdiction over a person domiciled or habitually resident in a particular non-member state if the member state whose courts were asked to enforce the judgment had agreed with the non-member state that such judgments would not be enforced. Accordingly, by aarticle IX, paragraph 1 of the Canada-United Kingdom Convention, "The United Kingdom undertakes, in the circumstances permitted by Article 59 of the 1968 [Brussels] Convention, not to recognize or enforce under that Convention any judgment given in a third State which is a Party to that Convention against a person domiciled or habitually resident in Canada."

As far as its positive effect is concerned, namely the reciprocal enforcement of judgments between the two nations, the benefits of the convention are mainly procedural, in that the judgment is given the force of a local judgment by registration, thus eliminating the need to bring an action on it as a debt. The convention does not expand the range of judgments that would be enforceable between Canada and the United Kingdom by a common law action, because the grounds of jurisdiction that make a judgment enforceable under the convention reflect English common law principles that are shared by the common law jurisdictions of Canada.[12] Since the convention was made, the Canadian law has deviated markedly from the English common law by recognizing a much wider range of undefended judgments. Traditionally, at common law an undefended judgment was enforceable only on the basis of submission to the foreign court's jurisdiction by agreement or otherwise. In 1990 the Supreme Court of Canada decided that this principle was unduly restrictive. Henceforth, a foreign undefended judgment is recognized wherever there is a real and substantial connection with the foreign country.[13] This expanded basis for recognition applies under the convention because the drafters included a provision that the other state's court would

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[12] The grounds for jurisdiction are listed in art. V. The text of the Convention is attached as a schedule to each of the implementing statutes listed in app. A.

[13] Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256; Beals v. Saldanha, [2003] 3 S.C.R. 416, 254 D.L.R. (4th) 1. All Supreme Court of Canada decisions since 1985, and many earlier ones, are available online: Supreme Court of Canada, http://scc.lexum.umontreal.ca. Case law from all Canadian courts from recent years is available online: Canadian Legal Information Institute, http://www.canlii.org. Statute law is also available on the latter site except for British Columbia's, which can be found at http://www.qp.gov.bc.ca/statreg/.

have jurisdiction, even if none of the listed grounds is satisfied, if "the jurisdiction of the original court is otherwise recognised by the registering court".[14]

A similar bilateral enforcement of judgments treaty was signed with France in 1996, but has not yet been ratified by either state. There is doubt whether ratification is still possible, given that the "opting out" facility offered by article 59 of the Brussels Convention is no longer open under the Community legislation that has replaced the Brussels Convention.[15] The Uniform Law Conference did produce a model Act to implement the convention, and several provinces have enacted it, though obviously the relevant provisions are not in force.[16]

C. Hague Conventions

1) Hague Conventions ratified by Canada

Hague Convention on the Civil Aspects of International Child Abduction (1980)

Canada was one of the initiators of the project at the Hague Conference, no doubt because the problem addressed by the convention was relatively acute in Canada. [17] The courts of each province could take jurisdiction in custody on the basis of the presence of the child. There was a discretion to decline jurisdiction in favour of another jurisdiction from which the child had been taken by one or other parent, but the discretion was inconsistently exercised.[18] The adoption of the Hague Convention effected a real improvement in the Canadian law, although it has been suggested that the case law was already tending towards

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[14] Art. V(1)(f). Evans Dodd v. Gambin Associates (1994), 17 O.R. (3d) 803 (Gen. Div.), refused to apply the new principle under this provision of the Convention but the decision was based on the theory that the new principle did not apply to judgments from outside Canada, which has since been decisively rejected: Beals v. Saldanha, ibid.

[15] Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 72, preserves the status only of agreements made before the Regulation came into force. See Activities and Priorities of the Department of Justice in Private International Law, Report of the Department of Justice Canada to the Uniform Law Conference of Canada, Civil Section (Aug. 2008) (online: Uniform Law Conference of Canada, www.ulcc.ca/en/poam2/ZDOJ Annual Report on Activities.pdf) at para. 147.

[16] See the Table of Implementing Legislation, app. A.

[17] Keith B. Farquhar, "The Hague Convention on International Child Abduction Comes to Canada" (1983), 4 Can. J. Fam. L. 5 at 6. On the Canadian law relating to the convention, see generally Martha Bailey, "Hague Convention on the Civil Aspects of International Child Abduction", ch. 3A of James G. McLeod, Child Custody Law and Practice (Toronto: Thomson Carswell, 2007-) (looseleaf); Janet Walker, Castel and Walker Canadian Conflict of Laws, 6th ed. (Markham, Ont.: LexisNexis, 2005-) (looseleaf) at § 18.3.

[18] Farquhar, ibid. at 6 n. 9 refers to the existing law. The common law as it currently stands is set out in Jeffery Wilson, Wilson on Children and the Law (Markham, Ont.: LexisNexis, 1994-) (looseleaf) at § 2.51-2.55. See also Martha Bailey, "Canada's Implementation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction" (2000), 33 N.Y.U.J. Int'l L. & Pol. 17.

the position taken by the convention, namely, a presumption in favour of returning a child removed from the foreign jurisdiction by one parent against the wishes of the other.[19] It is worth noting that the law applicable to interprovincial custody matters has continued to move in that direction. In most provinces, jurisdiction in custody is now defined more strictly than it used to be, with the basic criterion being the habitual residence of the child in the province, subject only to specific exceptions.[20] The discretion to decline jurisdiction on the basis of *forum non conveniens* is also available so as, in effect, to force a parent to litigate the issue of custody in another province's court.[21] Enforcement of extraprovincial custody orders has also been made much easier than it formerly was.[22] For interprovincial custody disputes,[23] most provinces have also given their courts the power to make interim orders for the return of children who have been wrongfully removed to or detained in the province, in statutory language that echoes that of the convention.[24]

Canada ratified the convention effective 1983. It was the first Hague Convention to which Canada became a party. All Canadian common law jurisdictions have implemented the convention by a few statutory provisions giving the convention the force of law and designating the Central Authority for the province or territory for the purpose of the convention. The convention is annexed to each statute as a schedule. The potential conflict

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19 Farquhar, ibid. at 31. Prof. Farquhar, writing in 1983, notes at 32 the irony that, thanks to the Convention, the regime for returning a child to a foreign jurisdiction was in many ways superior to that which then applied between Canadian jurisdictions, a remark that still holds true to some extent even after the improvements effected by legislation and case law in the last 25 years. A recent survey is Aliamisse O. Mundulai, "Stretching the Boundaries in Child Access, Custody and Guardianship in Canada" (2005), 21 Can. J. Fam. L. 267.

20 See, for example, the Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 22; Family Relations Act, R.S.B.C. 1996, c. 128, s. 44. These provisions, and those of most other provinces, are based on the model Custody Jurisdiction and Enforcement Act promulgated (1982) by the Uniform Law Conference of Canada.

21 In W.(V.) v. S.(D.), [1996] 2 S.C.R. 108, 134 D.L.R. (4th) 481, a case from Quebec, the first instance judge made an order for return of the child to Maryland, in the United States, under the convention. The Supreme Court of Canada held that the convention did not apply because the child had not been wrongfully removed or retained, but upheld the order as a proper award of custody to the foreign-resident parent. In M.(L.C.) v. S.(J.N.), 2008 ABQB 459, the court ordered the return of a child to the United Arab Emirates, a non-convention country, on the ground that it was in the child's best interests that the courts in that country determine custody.

22 The Uniform Law Conference model Act, ibid., included enforcement provisions that most provinces have enacted, as in the Children's Law Reform Act, R.S.O. 1990, c. C.12, ss. 41-45, and the Family Relations Act, R.S.B.C. 1996, c. 128, ss. 48-54.

23 As well as custody disputes involving non-Hague Convention countries.

24 Family Relations Act, R.S.B.C. 1979, c. 121, s. 47; Child Custody Enforcement Act, R.S.M. 1987, c. C360, s. 6; Family Services Act, S.N.B. 1980, c. F-2.2, s. 130.1; Children's Law Act, R.S.N. 1990, c. C-13, s. 48; Children's Law Act, S.N.W.T. 1997, c. 14, s. 28 (also applies in Nunavut); Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 40; Custody Jurisdiction and Enforcement Act, R.S.P.E.I. 1988, c. C-33, s. 16; Children's Law Act, S.S. 1997, c. C-8.2, ss. 17 and 18; Children's Act, R.S.Y. 1986, c. 22, s. 49.

between the rules in the convention and those in other provincial laws relating to custody is expressly resolved in favour of the convention.[25]

The issue of conflict with other custody laws is not always easily resolved. That is particularly so in provinces that have included the provisions implementing the convention in statutes dealing with child custody more generally, which may imply a legislative intention to integrate, so far as possible, the convention's rules with the other parts of the statute. The most prominent example of this issue is in the leading Supreme Court of Canada decision on the convention, *Thomson v. Thomson*.[26]

A father, resident in Scotland, sought the return of his less than one-year-old son from Manitoba under the convention. The Manitoba court ordered the mother to return the son to Scotland but, to deal with the fact that the father had been given custody by a Scottish court's "chasing order"[27] and so would have the right to custody of the child as soon as the mother arrived with the son in Scotland, the court granted the mother interim custody for four months. The jurisdiction to award interim custody was drawn from the statute that implemented the convention, but the relevant section formed part of a group of provisions dealing with the recognition and enforcement of extraprovincial custody orders, not orders for the return of a child under the convention.[28] The Act does not clearly state that provisions implementing the convention take precedence over other provisions of the Act.[29] The Manitoba Court of Appeal nevertheless held this part of the judge's order was invalid. The section, which authorizes an interim custody order even in favour of someone who has "wrongfully removed" or "wrongfully retained" a child, could not be construed to apply to orders under the convention because it was inconsistent with the obligation under the convention to order the return of the child "forthwith".

The Supreme Court of Canada held that the interim order was no longer needed because the father had given an undertaking that, if the mother accompanied the child back to Scotland,

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[25] See, for instance, in Alberta, International Child Abduction Act, R.S.A. 2000, c. I-4, s. 7; in Ontario, Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 46(8). The Alberta statute follows the model Act proposed by the Uniform Law Conference.

[26] [1994] 3 S.C.R. 551, 119 D.L.R. (4th) 253.

[27] In other words, an order given after the child was removed from the jurisdiction with the purpose of helping to bring about the child's return.

[28] Child Custody Enforcement Act, C.C.S.M., c. C360, s. 17, s. 6(c).

[29] The section giving primacy over other, conflicting legislation refers to the entire Act, not just the portion implementing the convention: ibid., s. 19.

he would not enforce any right to custody he had under Scottish law until a full hearing of the matter in the Scottish court.[30] However, La Forest J., for the majority, expressed the opinion *obiter* that the Court of Appeal was right. The convention rules must operate independently of the general provisions for enforcing foreign custody orders. The Act did not call for "[s]uch mixing of independently devised comprehensive procedures".[31] If orders were necessary to mitigate potential harm to the child from an order for return that the court was obliged to make, "the court must be assumed to have sufficient control over its process to take the necessary action to meet the purpose and spirit of the Convention"[32]. In other words, the power to make supplementary orders had to be found not in the separate, express provisions of the Act but in the convention scheme itself, which impliedly might call for transitory measures to meet the practical exigencies of giving effect to the purposes of the convention. In a separate concurring judgment, L'Heureux-Dubé J. disagreed sharply on this point, holding that the Act on its proper construction did intend that the express power to order interim custody should be available to convention cases. "The emphasis placed upon prompt return in the Convention must be interpreted in light of the paramount objective of the best interests of children and in light of the express wording of the [statute] through which the Convention was enacted in Manitoba, and should not mean return without regard for the immediate needs or circumstances of the child."[33]

The convention has been the subject of a large body of jurisprudence in common law Canada. I have selected for discussion the cases that I think may be the most interesting from a comparative law point of view.

Interpretation of the Convention

Another important point made by the Supreme Court in *Thomson v. Thomson*[34] is the need to keep international uniformity in mind when interpreting a Canadian statute that implements an international convention. "It would be odd," said La Forest J., "if in construing an international treaty to which the legislature has attempted to give effect, the

30 Thomson, [1994] 3 S.C.R. 551 at 602-03, 119 D.L.R. (4th) 253 at 291.

31 Ibid. at 603 S.C.R., 291 D.L.R.

32 Ibid. at 605 S.C.R., 293 D.L.R.

33 Ibid. at 621 S.C.R., 305 D.L.R.

34 Ibid.

treaty were not interpreted in the manner in which the state parties to the treaty must have intended."[35] For this reason, the court approved having recourse to the *travaux préparatoires* for the convention, although under Canadian law the use that can be made of legislative history and preparatory materials in interpreting an ordinary statute is more circumscribed.[36] The *travaux* provided important support for the court's conclusion that the Scottish court itself had rights of custody, within the meaning of the convention,[37] because, while granting the mother interim custody, the court prohibited her from removing the child from Scotland without permission of the court, thus reserving to the court itself the right to determine the child's place of residence.[38]

Scope of the Convention

A more controversial aspect of *Thomson v. Thomson*, which also drew to some extent on the *travaux préparatoires*, was the way the court drew the line between prohibitions on removal of a child that are imposed to protect rights of custody and those that protect rights of access. The convention, the court said, was intended to support custody rights but not access rights.[39] The non-removal clause in the Scottish court's interim custody order in *Thomson* gave rise to a right of custody in the court because the purpose of the clause was to protect the court's jurisdiction to decide on permanent custody. La Forest J. indicated, however, that if a non-removal clause were included in an order granting permanent custody, the purpose of the clause would usually be solely to protect the other parent's access rights, so that a removal in breach of such a clause might well not be a wrongful removal under the convention because only the other parent's access rights, not custody rights, were at stake.[40] The court reiterated this view in a subsequent case from Quebec.[41]

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35 Ibid. at 578 S.C.R., 272 D.L.R.

36 Ibid., loc. cit. The court referred to art. 32 of the Vienna Convention on the Law of Treaties, which deals with supplementary means of interpretation. Canadian courts are readier today than formerly to look at pre-legislative material, especially when comes from an authoritative source like a law reform commission on whose proposals the legislation was based: see, e.g., Mazurenko v. Mazurenko (1981), 124 D.L.R. (3d) 406 (Alta. C.A.) at 413, leave to appeal to S.C.C. refused, 19 Oct. 1981. Legislative history or parliamentary debates are still, however, rarely admitted as a means to interpret statutory language: R. v. Heywood, [1994] 3 S.C.R. 761 at 788, 120 D.L.R. (4th) 348 at 380-81.

37 See art. 5, para. (a).

38 [1994] 3 S.C.R. 551 at 580-82, 119 D.L.R. (4th) 253 at 274-76.

39 Ibid. at 581-82 S.C.R., 275-76 D.L.R., referring to, inter alia, A.E. Anton, "The Hague Convention on International Child Abduction" (1981), 30 I.C.L.Q. 537 at 546 and 554-55.

40 Thomson, ibid. at 589-90 S.C.R., 281 D.L.R..

One author has suggested that this view is out of step with the way the convention has been interpreted elsewhere, because other courts have seen the non-removal clause as creating a right of custody in the access parent.[42]

Habitual Residence

The issue of habitual residence has not given rise to a great deal of case law. A couple of cases have involved infants who were taken by their mother, or by prospective adoptive parents with the mother's consent, soon after birth from the jurisdiction where they were born. The courts have held that those children could not be said to have been habitually resident in the country of their birth, at least where the mother's connections with the jurisdiction of birth were not strong. Fathers were therefore unable to have the children returned under the convention. [43]

Habitual residence is clearly distinguished from the Anglo-Canadian concept of domicile, which places much more emphasis on the very long-term intentions of the individual in question. A Canadian diplomat, for example, was held to be habitually resident in Poland, of which his wife was a national and where they and their two children had lived for seven years while he was posted in Warsaw. The father's transfer back to Canada and his subsequent decision to separate from his wife did not alter the children's habitual residence because under Polish law he could not move the children permanently without the mother's consent. His refusal to return the children at the end of a holiday visit was therefore wrongful retention.[44]

Rights of Custody

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41 W.(V.) v. S.(D.), [1996] 2 S.C.R. 108, 134 D.L.R. (4th) 481.

42 Martha Bailey, "The Right of a Non-custodial Parent to an Order for Return of a Child Under the Hague Convention" (1996), 13 Can. J. Fam. L. 287. Compare Re H (A Minor) (Aboduction: Rights of Custody), [2000] 2 A.C. 291 (H.L.), holding that a the application by a father for guardianship and access rights created custody rights in the court that were violated by removal of the child.

43 S.(J.W.) v. M.(N.C.) (1993), 12 Alta. L.R. (3d) 379, 145 A.R. 200 (sub nom. D.(H.A.) v. M.(N.C.)) (C.A.); White-Fourgere v. Holman, 2006 BCSC 1606; Jackson v. Graczyk, 2007 ONCA 388, 45 R.F.L. (6th) 63. In each case there were also other grounds for holding the removal was not wrongful.

44 Korutowska-Wooff v. Wooff (2004), 242 D.L.R. (4th) 385, 5 R.F.L. (6th) 104 (Ont. C.A.), leave to appeal to S.C.C. refused, 14 July 2005.

The cases show a number of instances in which, as the convention requires, Canadian common law courts have looked to the law of the child's habitual residence in order to determine whether the rights claimed by the other parent were rights of custody for the purposes of the convention. They have been held to exist in favour of parents who, according to that law, were entitled to joint custody of the child.[45] On the basis of expert evidence on the local law, a father was found to have custody rights although the child had never lived with him and he had never lived with the mother.[46] The relevant custody rights have been found to be vested in a court, as in *Thomson*,[47] and in a government guardianship department that was investigating the child's welfare.[48]

Wrongful Removal

Most cases in which wrongful removal was in issue turned on the question whether the applicant parent was exercising rights of custody. Consent, however, has sometimes been the critical question. In a recent British Columbia case, the father's consent to the removal of the children from Australia to Canada was held to have been obtained by the mother's deception that she intended to return, and was therefore no genuine consent.[49]

Wrongful Retention

One question that involves the respective roles of the courts in the requesting state and the requested state is whether a court in the requesting state can assist the applicant parent by making a "chasing order" after the removal of the child. If the removal was wrongful to begin with the chasing order adds nothing, legally, to the applicant's case, but if the removal was not wrongful the question is whether the chasing order can be the ground for a finding that the retention in the requested state is wrongful. This point came up in *Thomson*

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45 C.(D.M.) v. W.(D.L.) (2001), 15 R.F.L. (5th) 35 (B.C.C.A.); New Brunswick (Attorney General) v. Majeau-Prasad (2000), 10 R.F.L. (5th) 389 (N.B.Q.B.); Antonini v. Antonini (1996), [1997] 1 W.W.R. 168, 149 Sask. R 279 (Q.B.).

46 Wedig v. Gaukel, 2007 ONCA 521, 38 RFL (6th) 91.

47 Thomson v. Thomson, [1994] 3 S.C.R. 551, 119 D.L.R. (4th) 253; also Thorne v. Dryden-Hall (1997), 148 D.L.R. (4th) 508, 35 B.C.L.R. (3d) 121 (C.A.); Kinnersley-Turner v. Kinnersley-Turner (1996), 24 R.F.L. (4th) 252, 94 O.A.C. 376 (C.A.).

48 Rechsteiner v. Kendell (1999), 1 R.F.L. (5th) 101 (Ont. C.A.).

49 Mathews v. Mathews, 2007 BCSC 1825.

v. Thomson.[50] The Scottish court had made a chasing order of custody in the father's favour after the mother had moved with the child to Manitoba. The Supreme Court took the position that such an order could not, in itself, make the retention wrongful. The court relied on the absence of any provision in the convention about giving effect to *ex post facto* custody orders in the requesting state, and, again, on the *travaux préparatoires* for the convention, which discussed wrongful retention only in terms of retention after expiry of a period of access.[51] The court noted that several British courts had seemed to decide that chasing orders could give rise to wrongful retention under the convention, but it treated the decisions warily, observing that a chasing order made against a custodial parent (other than one with only interim custody) would seem aimed at protecting interests other than custody rights. "Should such a situation arise here, it would have to be very carefully scrutinized to see if this conformed to the letter and spirit of the Convention."[52]

In two very similar cases from Alberta, fathers argued that their announced wish to have their children returned to France made the mothers' retention of the children in Canada wrongful. In both cases the argument was rejected because the change of heart occurred after the family had moved permanently to Canada, the father originally intending to move to Canada with them. The children were therefore habitually resident in Canada at the time when the detention supposedly became wrongful.[53]

Grounds for Refusing to Order the Return of the Child

The convention provides four principal grounds on which the return of a child may be refused, notwithstanding a wrongful removal or retention. (1) The first only applies if the proceedings for return are commenced more than one year after the date of wrongful removal or retention. In such a case an order for return may be refused if "it is demonstrated that the child is now settled in its new environment".[54] The other three can be

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50 [1994] 3 S.C.R. 551, 119 D.L.R. (4th) 253.

51 Ibid. at 592-93 S.C.R., 283-84 D.L.R.

52 Ibid. at 594 S.C.R., 284-85 D.L.R. See also W.(V.) v. S.(D.), [1996] 2 S.C.R. 108, 134 D.L.R. (4th) 481 at ¶ 51.

53 deHaan v. Gracia, 2004 ABQB 74, 1 R.F.L. (6th) 140; Proia v. Proia (2003), 41 R.F.L. (5th) 371 (Alta. Q.B.). Compare Den Ouden v. Laframboise, 2006 ABCA 403, 417 A.R. 179, in which the father changed his mind about the move to Canada before the mother and children left the Netherlands and the mother's failure to return the children therefore was wrongful retention.

54 Art. 12, para. 2. Kubera v. Kubera, 2008 BCSC 1340, decided on the basis of the word "now" that the relevant time for deciding this question was not the date of the application but the date on which the application was heard.

raised in any case: (2) There is no obligation to order return if the rights of custody being invoked in the application for return were not actually being exercised at the time of the removal or retention, or the removal or retention was consented to or subsequently acquiesced in by the person or institution that had the custody rights in question.[55] (3) Nor is there an obligation to order return if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation".[56] (4) An order for return may also be refused if the judicial or administrative authority "finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views".[57] (The convention provides a fifth ground where the return of the child would "not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms",[58] but this is seldom invoked and appears not to have been the subject of any Canadian common law decision.[59])

Exception (1) is not a major threat to the effectiveness and uniformity of the convention system because it is only available if the application is made more than a year after the date of the removal or retention. Nor is exception (2), because the court or administrative authority does not have great leeway in deciding whether the rights of custody were being exercised, or whether the removal or retention was consented to or acquiesced in; those issues are usually fairly closely tied to the facts.[60] But exceptions (3) and (4) both turn on an evaluation of the circumstances that some courts or authorities may approach very differently from others, and so call for restrained application, lest they become over-used and so undermine the purpose of the convention to offer a reliable mechanism for securing a child's return.

Canadian common law courts have tended to be mindful of this risk when approaching exceptions (3) and (4). A good illustration is a case from Nova Scotia[61] in which a daughter

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55 Art. 13, para. 1, subpara. (a).

56 Art. 13, para. 1, subpara. (b).

57 Art. 13, para. (2).

58 Art. 20.

59 It was discussed, but in circumstances clearly outside the provision, in S.(J.S.) v. S.(P.R.), 2001 SKQB 283, [2001] 9 W.W.R. 581.

60 Mere delay for eight months could not be acquiescence: Ibrahim v. Girgis, 2008 ONCA 23. The acquiescence exception was also rejected on the facts in Katsigiannis v. Kottick-Katsigiannis (2001), 203 D.L.R. (4th) 386 (Ont. C.A.).

61 Aulwes v. Mai (2002), 220 D.L.R. (4th) 577, 209 N.S.R. 92d) 248 (sub nom. A.(J.E.) v. M.(C.L.)) (N.S.C.A.).

had been wrongfully removed in 1995 by her mother from Iowa, where the father had visiting rights that the mother wanted to prevent him from exercising. It was not until 2001 that the father learned of the daughter's whereabouts as a result of the mother being divorced in Nova Scotia from her second husband. The father's application for return of his daughter to Iowa succeeded at first instance. The mother admitted that she had wrongfully removed the child from Iowa and the judge found that a return to Iowa would not expose the daughter, now aged about ten, to a grave risk of physical or psychological harm or otherwise place her in an intolerable situation. The mother appealed on the basis that the judge had failed to give sufficient weight to the fact that the daughter did not want to return to Iowa (exception (4), the "own wishes" exception) or to the fact that the child was settled into her environment in Nova Scotia, where she had lived for the last four years (exception (1), the "settled in" exception).

The Court of Appeal upheld the order for return. It thought the trial judge had not been wrong to discount the child's own views, given that she was dependent on, and probably influenced by, her mother. Once it was found that a return would not pose a grave risk of physical or psychological harm to her, it followed that her own wishes should not be given great weight. The court stressed that one of the policies underlying the convention is to deter child abduction, and that policy is promoted by certainty that return will be ordered. For that reason, courts should not be too ready to give effect to the "settled into the environment" exception. The exception should be applied only where circumstances had weakened the case for entrusting the courts of the habitual residence with the issues relating to the child's best interests.[62] The court said the child's links to Iowa could not be ignored, and neither could the justice or logic of entrusting the child's interests to the courts of that state. In addition, the court remarked that the child's circumstances in Nova Scotia were not all that settled, given the breakup of the mother's second marriage and the uncertainty as to whether mother and daughter could stay in Canada, now that immigration officials were investigating whether they should be deported as having entered the country illegally.

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[62] Those circumstances were found in the Alberta case, Hamel-Smith v. Gonsalves (2000), 185 D.L.R. (4th) 713, 5 R.F.L. (5th) 368 (Alta. Q.B.).

Exception (3), the "grave risk" exception, is probably the most often argued because it is so easily raised. On the whole, the courts have approached it with circumspection. The "standard applied in Canada"[63] is that articulated by La Forest J. in *Thomson v. Thomson*:[64]

[A]lthough the word "grave" modifies "risk" and not "harm", this must be read in conjunction with the clause "*or otherwise* place the child in an intolerable situation". The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation. . . . In *Re A. (A Minor) (Abduction)* [[1988] 1 F.L.R. 365 (Eng. C.A.)], Nourse L.J., in my view correctly, expressed the approach that should be taken, at p. 372:

. . . the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree . . . that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words 'or otherwise place the child in an intolerable situation'.

Where courts have found the exception made out, there were usually fairly extreme problems with the circumstances of the parent claiming return. Thus a return to Hong Kong at the instance of the mother was refused by the British Columbia courts because the mother led an unstable life, was prone to hide the child from the father, and had no immigration permission for the daughter for more than a short period. These factors were reinforced by the father's being in prison in Alberta for the next two years and so unable to travel abroad to protect his or the daughter's interest in any custody proceedings.[65] In a recent case[66] an Alberta court refused to return a child to France, where her father lived, because the mother had shown on a balance of probabilities that there was a grave risk that

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63 Cannock v. Fleguel, 2008 ONCA 758 at ¶ 25.

64 [1994] 3 S.C.R. 551 at 596-97, 119 D.L.R. (4th) 253 at 286-87 (emphasis in the original).

65 Chan v. Chow (2001), 199 D.L.R. (4th) 478, [2001] 8 W.W.R. 63 (B.C.C.A.). Compare Jabbaz v. Mouammar (2003), 226 D.L.R. (4th) 494 (Ont. C.A.), in which the mother's uncertain immigration status in the United States did not present a grave risk to the child if she were ordered returned to the mother in California. The Ontario court said it was in no position to assess what the mother's immigration status was or what the American authorities might do. On the other hand, in Espiritu v. Bielza, 2007 ONCJ 175, 39 R.F.L. (6th) 218, the applicant parent did not live in Texas, where he said his custody rights were violated, but in the Philippines, and he had had virtually no contact with the child; the "grave risk" exception was held to be made out.

66 R.(D.) v. K.(A.A.), 2006 ABQB 286, [2006] 12 W.W.R. 239.

the daughter would be exposed to physical or psychological harm because of her father's sexual abuse. The court held that a French court, which had attempted to enforce the father's right of access, had been manifestly wrong to reject a Canadian child psychologist's opinion that the daughter's allegations were credible and not produced by the mother's manipulation. In an Ontario case[67] the "grave risk" was shown because the mother, on whom the two-year-old child was completely dependent, would be in a dangerous situation herself if the child were ordered returned, the father having been shown to be abusive and violent towards the mother. And a "grave risk" was found in another Ontario case in which the applicant father was living in Hungary as a fugitive from justice.[68]

In ordering a half-aboriginal child returned to a non-aboriginal environment in Oregon, where the father lived and from which the child had been wrongfully removed, a British Columbia court said that the "grave risk of physical or psychological harm" must be an intolerable situation going beyond the normal disruption to be expected from the removal of a small child, and stressed that the court was not concerned with determining the best interests of the child as under a custody application.[69] On the other hand, in *Thomson v. Thomson*,[70] the Supreme Court rejected an argument that courts must take account only of grave risks stemming from the return as such and not grave risks stemming from separation from the parent currently with the child. "[F]rom a child-centred perspective," La Forest J. said, "harm is harm."[71] However, the physical or psychological harm must be "harm to a degree that also amounts to an intolerable situation",[72] and the court accepted that "it would only be in the rarest of cases that the effects of 'settling in' to the abductor's environment would constitute the level of harm contemplated by the Convention".[73] There are a

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67 Pollastro v. Pollastro (1999), 171 D.L.R. (4th) 32 (Ont. C.A.).

68 Kovacs v. Kovacs (2002), 212 D.L.R. (4th) 711 (Ont. S.C.J.).

69 Hoskins v. Boyd, [1997] 6 W.W.R. 526, 34 B.C.L.R. (3d) 121 (C.A.).

70 [1994] 3 S.C.R. 551, 119 D.L.R. (4th) 253.

71 Ibid. at 597 S.C.R., 287 D.L.R.

72 Ibid. at 596 S.C.R., 286 D.L.R.

73 Ibid. at 597 S.C.R., 287 D.L.R.

considerable number of other cases in which the "grave risk" exception has been argued but rejected.[74]

In one Ontario case, the court refused to order the return of the child on the ground of the "grave risk" exception, and so allowed the abducting parent to retain the child for the time being, but at the same time the court held that a court in North Carolina was more appropriate than one in Ontario for deciding on custody and so the mother was ordered not to remove the child from Ontario until a further order of the North Carolina court.[75]

Abduction out of Canada

In a few cases, Canadian common law courts have dealt with the wrongful removal of children from Canada to elsewhere. In one case an Ontario court made a finding of wrongful removal at the request of the Lord Chancellor's Department as the Central Authority for England and Wales, pursuant to article 15 of the convention, which contemplates such judicial co-operation.[76] In another Ontario case the court made a similar finding of wrongful removal under the convention, not at the request of the authorities in the Czech Republic, where the father took the child, but as a step in Ontario custody proceedings to which both parents were parties. The father was ordered to return the child to Ontario before his application for custody could proceed.[77]

In a recent case, a court in Oklahoma had refused to order the return of a child to Ontario under the convention, because it found the "own views" exception (number (4) above) to be made out; the child, aged 14, did not wish to return. The Ontario court, which was asked to take jurisdiction in custody, refused to do so, holding that the Oklahoma decision was reasonable and the Oklahoma court was therefore the more appropriate forum for custody proceedings.[78]

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74 C.(D.M.) v. W.(D.L.) (2001), 15 R.F.L. (5th) 35 (B.C.C.A.); Mahler v. Mahler (1999), 3 R.F.L. (5th) 428 (Man. Q.B.); New Brunswick (Attorney General) v. Majeau-Prasad (2000), 10 R.F.L. (5th) 389 (N.B.Q.B.); Finzio v. Scoppio-Finzio (1999), 1 R.F.L. (5th) 222 (Ont. C.A.). In Chalkley v. Chalkley (1995), 100 Man. R. (2d) 34 (C.A.), the exception was made out for one child but not the other.

75 Williams v. Elliott (2001), 21 R.F.L. (5th) 247 (Ont. S.C.J.).

76 Beckett v. Morris (1996), 24 R.F.L. (4th) 275 (Ont. Div. Ct.).

77 Benditkis v. Benditkis (20 Nov. 2007), Doc. No. 05-FL-3204 (Ont. S.C.J.)

78 Pitts v. De Silva, 2008 ONCA 9, 289 D.L.R. (4th) 40, leave to appeal to S.C.C. refused, 15 May 2008.

Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (1993)

The convention entered into force in Canada on April 1st 1997 in the five provinces which were the first to enact implementing legislation, i.e. British Columbia, Prince Edward Island, Manitoba, New Brunswick and Saskatchewan. On November 1st 1997, the convention entered into force for Alberta; on August 1st 1998 for the Yukon; on October 1st 1999 for Nova Scotia; on December 1st 1999 for Ontario; the Northwest Territories on April 1st 2000, Nunavut on September 1st 2001 and Newfoundland on December 1st 2003.[79] With one exception the implementing legislation in each of these provinces and territories[80] follows, albeit with variations, the *Uniform Intercountry Adoption (Hague Convention) Act* proposed by the Uniform Law Conference of Canada in 1993. This statute declares that when the convention enters into force in respect of the province, the convention is law in the enacting jurisdiction; in other words, the terms of the convention are incorporated into the local law.[81] The implementing legislation provides that where there is a conflict between the law of the enacting jurisdiction and the convention, the convention prevails.[82] The exception to this pattern of implementation is Alberta, where the convention is implemented by substantive provisions paralleling most of the convention provisions, and by regulations made under the statute.[83]

The scope of the convention is defined in terms of the adoption taking place in the contracting state in which the child is habitually resident (the state of origin) and adopting parent or parents being habitually resident in another contracting state, to which the child

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[79] Activities and Priorities of the Department of Justice in Private International Law, Report of the Department of Justice Canada to the Uniform Law Conference of Canada, Civil Section (Aug. 2008) (online: www.ulcc.ca/en/poam2/ZDOJ Annual Report on Activities.pdf) at ¶ 182.

[80] See app. A.

[81] The model Act with commentary is available online: Uniform Law Conference of Canada, http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1i1. Some statutes, like Ontario's, add provisions with respect to the specific steps to be taken in Ontario in respect of an intercountry adoption: Intercountry Adoption Act, 1998, S.O. 1998, c. 29, s. 5 ff.

[82] S. 3(2) of the model Act. See, for instance, Intercountry Adoption Act, 1998, S.O. 1998, c. 29, s. 3(2).

[83] Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12, Part 2, Div. 6, and Alta. Reg. 187/2004, Part 2. The statute varies the convention slightly. For example, the convention says that the state of origin, "having regard to the age and degree of maturity of the child", must ensure that the child receives counseling and that the child's views are taken into account (art. 4, para. (d)). The Alberta statute, s. 95(2)(e), stipulates these requirements for any child 12 years of age or older.

has been or is to be moved (the receiving state).[84] The core of the convention is a set of obligations that must be fulfilled by the competent authorities (as defined) in the state of origin and in the receiving state.[85] Procedures for satisfying these obligations are set out in detail.[86]

As far as the author has been able to determine, there is no Canadian common law jurisprudence on the convention.[87] This is not surprising since the convention deals more with the licensing of agencies, and the administrative safeguards and procedures to be followed in approving an adoption, than with rules of law. For the same reason, the integration of the convention's rules with the existing laws on adoption has not proved difficult or controversial.

The obligation under the convention to recognize an adoption that is made under the convention in another jurisdiction[88] is significant but must be seen against the background of the existing rules as to the recognition of foreign adoptions. Statutory rules in many provinces require recognition of any adoption made in a jurisdiction outside Canada if the adoption has substantially the same effect in that other jurisdiction as a domestic adoption has.[89] Common law rules (though on the basis of little case law) allow recognition of any adoption that took place in the child's domicile, at least if the adoptive parents were resident there.[90] The recognition rules aside from the convention are therefore already quite favourable to the recognition of adoptions made in the jurisdictions; the convention adds some certainty, but little added scope, to those rules.

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84 Art. 2.

85 Arts. 4-5.

86 Arts. 14-22. See also Janet Walker, Castel and Walker Canadian Conflict of Laws, 6th ed. (Markham, Ont.: LexisNexis, 2005-) (looseleaf) at § 20.7.

87 There is one case, L.(T.I.) v. F.(J.L.), 2001 MBCA 22, 197 D.L.R. (4th) 721, which decides that the adoption before it was not an intercountry adoption because the child and the adoptive parents were all habitually resident in Manitoba. In any case the other jurisdiction involved, North Dakota, was not then designated as a jurisdiction to which the convention applied, so the general provisions of Manitoba law on intercountry adoptions would have been applicable.

88 Art. 23.

89 See, for example, Adoption Act, R.S.B.C. 1996, c. 5, s. 47. A full list is in Janet Walker, Castel and Walker Canadian Conflict of Laws, 6th ed. (Markham, Ont.: LexisNexis, 2005-) (looseleaf) at § 20.6, fn. 1.

90 See Walker, ibid. at § 20.6.

Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (1965)

Canada became a party to this convention by accession, effective 1988. Unlike the other Hague Conventions, it has been implemented in the common law Canadian jurisdictions, not by statute but by delegated legislation, namely, the rules of court (also called rules of civil procedure in some provinces). The rules of court are, in effect, regulations made under the statute that governs the existence and operation of the court in question. The convention's provisions have been given effect in this way in the rules of the courts of every common law jurisdiction of Canada, as well as those of the Federal Courts and the Tax Court of Canada.[91]

The rules for service of process apart from the convention differ in detail from one common law province and territory to another, but all reflect the traditional Anglo-Canadian emphasis on the fact of notice rather than the form in which, or the means by which, notice is given. Hence the convention's rules, which are aimed at compliance with—usually—more formal rules in other jurisdictions, typically operate to reduce, rather than expand, what would otherwise be the options for effecting valid service.

One major difference in the implementing rules is that some provinces' rules require compliance with the convention if the defendant is to be served in a contracting state, and other provinces' rules do not. The latter provinces also permit service in any non-convention manner, usually personal service, that would be a valid method of service within the province. Compliance with the convention, when serving a person in a contracting state, is mandatory in the rules of the Federal Court, the (federal) Tax Court, and the courts of New Brunswick, Nova Scotia, and Ontario. The other jurisdictions allow, as an alternative, other methods of service that comply with the province's own rules.[92]

The case law on the convention largely revolves around this distinction. In one case, an Ontario litigant sought an order validating service on a party in Switzerland, which is a

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[91] See the Table of Implementing Legislation in app. A. Unlike the rules in the other jurisdictions, Manitoba's do not specifically refer to service under the convention in the rules about how service is to be effected, authorizing instead any manner of service that is "prescribed by the law of the jurisdiction where service is made if that manner of service could reasonably be expected to come to the notice of the person being served" (Queen's Bench Rule 17.05(1)). The convention is, however, referred to in R. 69, dealing with entering default judgment when the originating process was transmitted abroad under the convention.

[92] See the notations in app. A.

contracting state under the convention. Switzerland had registered its objection, pursuant to article 10 of the convention, to any method of service other than through its Central Authority. The litigant had not used the Central Authority but argued that the method of service that had been used had brought the Ontario action to the Swiss resident's attention. The court refused to validate the service on the ground that to do so would circumvent the clear requirement in Ontario Civil Procedure Rule 17.05 that the procedure in the convention be followed. "It is not permissible to avoid the requirements, as set out in the Hague Convention, simply because these requirements may cause difficulty, inconvenience or expense for the serving party."[93]

This may be contrasted with another case in Ontario in which the plaintiffs sought to bring an action against former and present officials of the government of China in connection with their alleged mistreatment of practitioners of Falun Gong. China, like Switzerland, requires service through its Central Authority, having objected under art. 10 to the use of other means of transmission. The Central Authority had refused to transmit the plaintiff's originating process on the basis that the action would infringe Chinese sovereignty. A Master of the Ontario Superior Court of Justice granted the plaintiffs' *ex parte* motion to dispense with service in order to allow the action to proceed to the next stage. The court stressed that the plaintiffs were alleging gross violations of fundamental human rights and international law, and would be unable to pursue those claims unless the court dispensed with service.[94]

If there is an issue as to whether a contracting state has objected under article 10 to transmission of process by postal or other means that do not involve the Central Authority, the party served has the onus of showing that the state did object and service was therefore not in compliance with the convention.[95] Conversely, the certification of transmission by the Central Authority is conclusive that the convention's requirements were satisfied.[96]

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93 Campeau v. Campeau (22 Nov. 2004), Doc. No. 335-2003 (Ont. S.C.J.) at ¶ 48. To the same effect is Dofasco Inc. v. Ucar Carbon Canada Inc. (1998), 27 C.P.C. (4th) 342 (Ont. Gen. Div.).

94 Zhang v. Jiang (2006), 82 O.R. (3d) 306 (S.C.J. (Master)).

95 Integral Energy & Environmental Engineering Ltd. v. Schenker of Canada Ltd. (2001), 295 A.R. 233 at ¶ 36 (Q.B.); Grant v. Grant, 2003 BCSC 649, 34 C.P.C. (5th) 374.

96 Traxler v. Metzeler Reofem GmbH, 2000 BCSC 2060, 4 C.P.C. (5th) 95.

In British Columbia, whose rules of court permit but do not require that the convention be followed for service in a contracting state, the courts have upheld the validity of non-convention means of service in a contracting state,[97] An argument has been made to the Court of Appeal that comity demands compliance with the convention in a contracting state, even if the rules do not, but the Court of Appeal chose not to decide the question.[98] Practical considerations, if not legal ones, may induce the party serving to comply with the convention in ay event. Even if service that does not comply with the convention is valid as far as the British Columbia proceeding is concerned, the litigant may face difficulties in enforcing, in the contracting state, a British Columbia judgment based on such service, unless the defendant decides to appear.[99]

Hague Convention on the Law Applicable to Trusts and on their Recognition (1985)

This is the only one of the four Hague Conventions to which Canada is a party that has not been implemented in all the common law jurisdictions of Canada, with Ontario, the Northwest Territories, Nunavut and Yukon not yet having passed it into law.[100] Since private international law cases involving trusts are relatively rare in Canada, adoption of the convention by these jurisdictions may not have been seen as a high priority, although it does provide some certainty in an underdeveloped area of law.

The implementing legislation in the jurisdictions that have given effect to the convention follows a model Act put forward by the Uniform Law Conference.[101] The model Act expressly excludes cases in which the conflict is between the laws of two or more Canadian jurisdictions.[102] However, only Alberta and New Brunswick have incorporated the exclusion into their implementing statute.[103] It is unclear whether the convention's rules apply to intra-Canadian conflicts of laws in the provinces that have not expressly excluded

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97 Mathers v. Bruce, 2002 BCSC 210, ¶ 15 (copy left with the defendant); Grant v. Grant, 2003 BCSC 649, 34 C.P.C. (5th) 374 (by post); see also Wilson v. Servier Canada Inc. (2002), 58 O.R. (3d) 753 (S.C.J.), ¶ 14 (by post).

98 Wall v. Toyota Motor Corp. (1993), 84 B.C.L.R. (2d) 395 (C.A.) at ¶ 17.

99 This was the reason why the plaintiff in Tamlin International Homes Co. v. Ikoma, 2001 BCSC 1039, 93 B.C.L.R. (3d) 191, served the defendant a second time in compliance with the convention (albeit that the second service was rendered nugatory by steps subsequently taken in British Columbia).

100 See the Table of Implementing Legislation in app. A.

101 Uniform International Trusts Act (1989).

102 Ibid., s. 2(2). The exclusion is contemplated, but not required, by the convention (art. 24).

103 International Conventions Implementation Act, R.S.A. 2000, c. I-6, s. 1(2); International Trusts Act, S.N.B. 1988, c. I-12.3, s. 2.

them from such cases. The leading Canadian treatise on trust law argues that the convention (as the title of the model implementing statute, *International Trusts Act*, implies) was intended to deal with international situations, not to establish rules for situations arising entirely within a contracting state.[104] Wherever the convention does not apply (whatever the scope of that exclusion may be in each province) the common law rules will apply. British Columbia and New Brunswick are exceptions because they have enacted the Uniform Law Conference's model *Conflict of Law Rules for Trusts Act*, which replaces the common law conflict of laws rules when the law governing the trust, as selected under the statute, is the law of a Canadian jurisdiction.[105]

An interesting feature of the convention, which is reflected in the model Act, is the right of a state party to declare the reservations permitted by the convention separately for each territorial unit within the state to which the convention is to apply.[106] The three potential reservations relate to the right to give effect, irrespective of the law that governs a trust, to rules of law of a closely connected foreign state that "must be applied even to international situations, irrespective of rules of the conflict of laws" (in other words, laws of immediate application or mandatory rules);[107] the obligation to recognize a trust if it is governed by the law of a non-contracting state;[108] and the obligation to apply the convention to trusts created before the date on which the convention enters into force for the enacting jurisdiction. Only Alberta (via Canada) has declared the first reservation.[109] No province has declared the second reservation. Alberta, Manitoba, New Brunswick and Saskatchewan have declared the third reservation.[110]

The model Act also contemplates that enacting jurisdictions may wish to extend the scope of the convention's provisions beyond the "trusts created voluntarily and evidenced in

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104 Donovan D.M. Waters, ed., Waters' Law of Trusts in Canada, 3rd ed. (Toronto: Thomson Carswell, 2005) at 1377.

105 Conflict of Laws Rules for Trusts Act, R.S.B.C. 1996, c. 65, s. 2(1); Conflict of Laws Rules for Trusts Act, S.N.B. 1988, c. C-16.2, s. 2(1). The relationship between the convention, the common law, and these two statutes is analyzed in detail in Waters, ibid. at 1376-79.

106 Reservations are permitted to art. 16, 21 and 22, and art. 26 expressly allows a reservation to be expressed on each occasion that a state party makes a declaration under art. 29 that the convention extends to one of its territorial units.

107 Art. 16, para. 2.

108 Art. 21.

109 International Conventions Implementation Act, R.S.A. 2000, c. I-6, s. 1(4).

110 International Conventions Implementation Act, R.S.A. 2000, c. I-6, s. 1(5); International Trusts Act, C.C.S.M., c. T165, s. 3; International Trusts Act, S.N.B. 1988, c. I-12.3, s. 5; Trusts Convention Implementation Act, S.S. 1994, c. T-23.1, s. 4.

writing" to which the convention is expressly restricted.[111] The Act therefore contains an optional provision, reflecting an optional declaration under the convention,[112] that extends the convention to "trusts declared by judicial decisions including constructive trusts and resulting trusts".[113] Such a trust or a severable aspect of such a trust need not be recognized or given effect if the court of the enacting jurisdiction "is satisfied that there is a substantial reason for refusing to give recognition or effect to the trust or aspect".[114] All the enacting jurisdictions have chosen to enlarge the convention's scope by including these provisions. It is difficult to know, however, how much room there is for the convention's rules to operate, given that a court has already decided, applying its own or some other state's law, that the trust exists.[115]

The provisions of the convention are largely consistent with such Canadian private international law as there is on the law governing trusts and the recognition of trusts. There are few decided cases. At common law a trust of immovables, according to academic opinion, is governed by the law of the situs of the property,[116] or possibly the law that a court of the situs would apply (thus importing the doctrine of *renvoi*).[117] A trust of movables is thought to be governed by the law the settlor intended to apply to the trust or the law most closely connected to the trust.[118] The convention departs from these common law rules, if they are such, by making no distinction between immovables and movables, although the fact that trust assets are immovables may be a relevant factor in determining the applicable rule of law[119] or, in extreme cases, raise the objection of public policy against applying the convention's usual rules.[120]

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111 Art. 3.

112 Art. 20.

113 S. 3(1).

114 S. 3(2).

115 Donovan D.M. Waters, ed., Waters' Law of Trusts in Canada, 3rd ed. (Toronto: Thomson Carswell, 2005) at 1396. An interesting recent example of a judicially declared international trust is the British Columbia decision in Minera Aquiline Argentina S.A. v. IMA Exploration Inc. (2007), 68 B.C.L.R. (4th) 242, 2007 BCCA 319, leave to appeal to S.C.C. refused, 20 Dec. 2007. The court upheld the trial judge's declaration of a constructive trust over a mining property in Argentina. Both the successful plaintiff and the defendant were mining companies based in British Columbia.

116 Waters. ibid. at 1385.

117 Janet Walker, Castel and Walker Canadian Conflict of Laws, 6th ed. (Markham, Ont.: LexisNexis, 2005-) (looseleaf) at § 28.3.a.

118 Walker, ibid. at § 28.2.b.

119 It may affect a finding as to the law with which the trust is most closely connected. The situs of the assets is relevant to this inquiry (art. 7, para. 2(b)), and the assets being immovable may give this factor greater weight.

120 Public policy is made a ground for disregarding the convention's rules (art. 18).

The only Supreme Court of Canada decision on the law applicable to the essential validity of a trust is an unsatisfactory one of some 40 years ago.[121] It failed to distinguish between the validity of a testamentary disposition and the validity of a trust set up pursuant to a will, and applied the choice of law rule for the former—the law of the testator's last domicile, which was British Columbia law—to an issue that would have been better characterized as the latter. Had it been viewed as a question of the validity of the trust as such, the way would have been open to apply the law most closely connected to the trust. That was probably the law of New York, where the trustee was located and the trust was to be administered, although the trustee was empowered to acquire trust property, including land, in other jurisdictions. New York law would have upheld the validity of the trust, which was not valid under British Columbia law. The convention renders this decision obsolete for cases that are subject to it, since it expressly applies to trusts created both *inter vivos* and on death,[122] and requires the application of the law expressly or impliedly intended by the settlor[123] or, failing such intention, the law with which the trust is most closely connected.[124]

Few cases have considered the convention. In an Alberta case, the terms of a trust created by the will of a woman who died domiciled in Alberta provided that the woman's grand-niece should receive money from the trust when she attained the age of majority. The grand-niece, who was sixteen, lived with her mother in Romania. The court applied article 7 of the convention and held that the trust was governed by Alberta law, as the law with which the trust was most closely connected. The age at which the grand-niece reached the age of majority was therefore to be determined by Alberta law (age 18) rather than by Romanian law (said to be age 14).[125] In another Alberta case the court applied article 6 to hold that the settlor had effectively chosen Massachusetts law to govern the trust, although the court applied Alberta law because Massachusetts law had not been proved.[126] One British Columbia case, which dealt with a conflict of laws between Canadian provinces,

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121 Jewish National Fund v. Royal Trust Co., [1965] S.C.R. 784, 53 D.L.R. (2d) 577.

122 Art. 2, para. 1. Art. 4 excludes from the convention's rules "preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee", but the issue in the Jewish Fund case was clearly not such a "preliminary issue"; it related to the requirements of charitable purpose and of the rule against perpetuities.

123 Art. 6.

124 Art. 7.

125 Kelemen v. Alberta (Public Trustee), 2007 ABQB 56, [2007] 4 W.W.R. 562, 71 Alta. L.R. (4th) 366.

126 Royal Trust corp. of Canada v. S.(A.S.(W.)), 2004 ABQB 284, 35 Alta. L.R. (4th) 32.

nevertheless referred to article 11 of the convention (implications of the recognition of a trust) to support its conclusion that the exigibility of trust assets by a creditor of an insolvent or bankrtupt trustee was a matter of trust law and not bankruptcy law. By adopting the convention the legislature had indicated its view on this issue of characterization.[127]

2) Other Hague Conventions of interest to Canada

It remains to note several other Hague Conventions that are of interest from the Canadian point of view.

The Uniform Law Conference of Canada has promulgated implementing legislation on three Hague Conventions in anticipation of Canada's becoming a party to them, which has not yet occurred.

One is the Convention on the Law Applicable to Traffic Accidents (1971), for which the Conference developed the *Uniform Conflict of Laws (Traffic Accidents) Act* (1970). This statute has, strange to say, been adopted in Yukon but nowhere else in Canada.[128]

The other two are the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures of Protection of Children (1996), and the Convention on the International Protection of Adults (2000, not yet in force). The Uniform Law Conference proposed implementing these conventions with, respectively, the *Parental Responsibility and Measures for the Protection of Children (Hague Convention) Implementation Act* (2001) and the *International Protection of Adults (Hague Convention) Implementation Act* (2001). As of 2007, the federal Depart of Justice stated that one of its high priorities in the private international law area was to secure provincial consensus in order to move forward on Canada's accession to both conventions.[129] The convention on the protection of children

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127 Rowland v. Vancouver College Ltd., 2001 BCCA 527, 205 D.L.R. (4th) 193 at ¶ 164.

128 Conflict of Laws (Traffic Accidents) Act, R.S.Y. 2002, c. 38.

129 Activities and Priorities of the Department of Justice in Private International Law, Report of the Department of Justice Canada to the Uniform Law Conference of Canada, Civil Section (Aug. 2008) (online: www.ulcc.ca/en/poam2/ZDOJ Annual Report on Activities.pdf) at ¶ 154-163.

has been described as a desirable complement to the child abduction convention because it would enhance the international recognition of Canadian orders with respect to children.[130]

In 2007 the Department of Justice also reported to the Uniform Law Conference on Canada's potentially becoming a party to various other conventions concluded or under negotiation at the Hague Conference. In order of the seniority of the convention, these included the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.(1961),[131] the Convention on the Taking of Evidence Abroad in Civil Matters (1970),[132] the Convention on the Law Applicable to Succession to the Estates of Deceased Persons (1989, not yet in force),[133] the Convention on Securities Held by Intermediaries (2002, not yet in force),[134] the Convention on Choice of Court Agreements (2005, not yet in force).[135] and a draft Convention on the International Recovery of Support Orders and Other Forms of Family Maintenance.[136] The Department was consulting with officials of the provinces with respect to Canada's eventually becoming a party to these conventions. The Conventions on the Taking of Evidence Abroad and on the Law Applicable to Successions were regarded by the Department as lower priorities than the others.[137] The Convention on Jurisdiction, Recognition and Enforcement of Judgments, the negotiations for which proved unsuccessful, was also one in which Canada took an active interest.[138]

D. CIDIP Conventions

In 2007 the Department of Justice summarized Canada's participation in the CIDIP conferences as follows:

Canada is not party to any of the 21 OAS conventions in international private law, and had only observer status for the first four CIDIP meetings. Since becoming a member of the

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130 Jeffery Wilson, Wilson on Children and the Law (Markham, Ont.: LexisNexis, 1994-) (looseleaf) at § 2.62.

131 Ibid. at ¶ 153-159.

132 Ibid. at ¶ 160-163.

133 Ibid. at ¶ 220-223.

134 Ibid. at ¶ 56-61.

135 Ibid. at ¶ 146-152.

136 Ibid. at ¶ 192-199.

137 Ibid., concluding tables.

138 Bradbrooke Smith, "The Proposed Hague Convention on Jurisdiction, Recognition and Enforcement of Judgments" (1999), 12 Rev. québécoise dr. int. 73.

OAS in 1990, Canada has been exploring ways of enhancing legal cooperation with other OAS countries. Canada did participate officially in the 1994 Fifth Inter-American Conference on Private International Law (CIDIP-V) and in CIDIP-VI which took place in 2002. Since the adoption of an OAS General Assembly resolution in 2003, CIDIP-VII has been under preparation. Two topics have been selected: one on consumer protection, and the other on secured transactions and electronic registries. Canadian working groups comprised of representatives of the Department of Justice Canada (IPLS) and of federal and provincial/territorial experts are actively participating in the development of both projects. In addition, consultations with stakeholders will continue.[139]

E. Conclusion

The common law member states of the Hague Conference are among the least frequent adopters of the conference's conventions, but even when compared to this group Canada stands out for the small number of conventions it has subscribed to. One might have thought that Canada's being a bi-juridical nation would have made it more enthusiastic about conflict of laws conventions that are designed to harmonize civil and common law approaches to private international law. This does not seem to be the case. One surmises that the division between the federal government, which makes treaties on behalf of Canada, and the governments of the provinces and territories, which must (usually) implement treaties dealing with private law, inhibits a more ready response to these issues. The federal government does not wish to take the initiative unless it believes there is a reasonable consensus among the provinces in favour of implementing the treaty. The differences among the provinces as to legislative priorities, and the differences between the legislative approaches of Quebec and the common law provinces, mean that such a consensus tends to construct itself slowly. There have been exceptions, such as the adoption of the Hague Convention on the Civil Aspects of Child Abduction, for which support among the provinces developed fairly readily. Generally, however, becoming a party to conflict of laws conventions is an exercise that in Canada calls for patience.

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[139] Activities and Priorities of the Department of Justice in Private International Law, Report of the Department of Justice Canada to the Uniform Law Conference of Canada, Civil Section (Aug. 2008) (online: www.ulcc.ca/en/poam2/ZDOJ Annual Report on Activities.pdf) at ¶ 32.

It is worth the wait, however. There is no question that the conventions to which Canada has become a party have been of signal benefit to Canadian private international law. The Hague Conventions' use of habitual residence as the prime connecting factor has helped to hasten the eclipse of domicile in Anglo-Canadian law; the only major area where it remains relevant is succession, the one area in which it is arguably suitable. The visibility of even the few conflict of laws conventions to which Canada is a party has probably helped to promote an internationalist view of the Canadian conflict of laws, which has marked especially the judgments of the Supreme Court of Canada.[140] The conventions have also had an impact on the law applicable in non-convention cases, by providing a well-worked-out regime for dealing with problems on which Anglo-Canadian private international law is either inadequate or sparse. Thus the Child Abduction convention has affected the handling of interprovincial cases by accustoming legislators and judges to the workability of a system of speedy return of wrongfully removed or detained children to their home jurisdiction.[141] And the Trusts convention has already had some impact on the conflicts rules relating to trusts even when the convention does not apply.[142]

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[140] Most notably Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, with its emphasis on the role of private international law as a facilitator of the movement of wealth, skills and people across borders. See Robert Wai, "In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law" (2001), 39 Canadian Yearbook of International Law 117.

[141] Above, note 24 and accompanying text.

[142] Above, text accompanying note 127.

Appendix A

Table of Implementing Legislation

The abbreviations used for the provinces and territories of Canada below are as follows: AB = Alberta, BC = British Columbia, MB = Manitoba, NB = New Brunswick, NL = Newfoundland and Labrador, NS = Nova Scotia, NT = Northwest Territories, NU = Nunavut, ON = Ontario, PE = Prince Edward Island, SK = Saskatchewan, YT = Yukon. Quebec is dealt with in the separate National Report for Canada (Québec) prepared for this Conference by Me Frédérique Sabourin.

Conflict of Laws Conventions Other Than Hague and CIDIP Conventions

United Nations Convention on Contracts for the International Sale of Goods

Federal: *International Sale of Goods Convention Act*, S.C. 1991, c. 13.

AB: *International Conventions Implementation Act*, R.S.A. 2000, c. I-6, Part 2.

BC: *International Sale of Goods Act*, R.S.B.C. 1996, c. 236.

MB: *International Sale of Goods Act*, C.C.S.M., c. S11.

NB: *International Sale of Goods Act*, S.N.B. 1989, c. I-12.21.

NL: *International Sale of Goods Act*, R.S.N.L. 1990, c. I-16.

NS: *International Sale of Goods Act*, S.N.S. 1988, c. 13.

NT, NU: *International Sale of Goods Act*, R.S.N.W.T. 1988, c. I-7.

ON: *International Sale of Goods Act*, R.S.O. 1990, c. I.10.

PE: *International Sale of Goods Act*, R.S.P.E.I. 1988, c. I-6.

SK: *International Sale of Goods Act*, S.S. 1990-91, c. I-10.3.

YT: *International Sale of Goods Act*, R.S.Y. 2002, c. 124.

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)

Federal: *United Nations Foreign Arbitral Awards Act*, R.S.C. 1985, c. 16 (2nd Supp.).

AB: *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5, Part 1.

BC: *Foreign Arbitral Awards Act*, R.S.B.C. 1996, c. 154.

MB: *International Commercial Arbitration Act*, C.C.S.M., c. C151, Part I.

NB: *International Commercial Arbitration Act*, S.N.B. 1989, c. I-12.2, Part I.

NL: *International Commercial Arbitration Act,* R.S.N.L. 1990, c. I-15, Part I.

NS: *International Commercial Arbitration Act*, R.S.N.S. 1989, c. 234, Part I.

NT, NU: *International Commercial Arbitration Act*, R.S.N.W.T. 1988, c. I-6, Part I.

ON: *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9, s. 10.

PE: *International Commercial Arbitration Act*, R.S.P.E.I. 1988, c. I-5, Part I.

SK: *Enforcement of Foreign Arbitral Awards Act*, S.S. 1996, c. E-9.12.

YT: *Foreign Arbitral Awards Act*, R.S.Y. 2002, c. 93.

UNCITRAL Model Law on International Commercial Arbitration

Federal: *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.).

AB: *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5, Part 2.

BC: *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 236.

MB: *International Commercial Arbitration Act*, C.C.S.M., c. C151, Part II.

NB: *International Commercial Arbitration Act*, S.N.B. 1989, c. I-12.2, Part II.

NL: *International Commercial Arbitration Act,* R.S.N.L. 1990, c. I-15, Part II.

NS: *International Commercial Arbitration Act*, R.S.N.S. 1989, c. 234, Part II.

NT, NU: *International Commercial Arbitration Act*, R.S.N.W.T. 1988, c. I-6, Part II.

ON: *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9.

PE: *International Commercial Arbitration Act*, R.S.P.E.I. 1988, c. I-5, Part II.

SK: *International Commercial Arbitration Act*, S.S. 1988-89, c. I-10.2.

YT: *International Commercial Arbitration Act*, R.S.Y. 2002, c. 123.

Canada-United Kingdom Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters

Federal: *Canada-United Kingdom Civil and Commercial Judgments Convention Act*, R.S.C. 1985, c. C-30.

AB: *International Conventions Implementation Act*, R.S.A. 2000, c. I-6, Part 3.

BC: *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78, Part 4.

MB: *Canada-United Kingdom Judgments Enforcement Act*, C.C.S.M., c. J21.

NB: *Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters Act*, S.N.B. 1984, c. R-4.1.

NL: *Canada and the United Kingdom Reciprocal Recognition and Enforcement of Judgments Act*, R.S.N.L. 1990, c. C-3.

NS: *Canada and United Kingdom Reciprocal Recognition and Enforcement of Judgments Act*, R.S.N.S. 1989, c. 52.

NT, NU: *Reciprocal Enforcement of Judgments (Canada-U.K.) Act*, R.S.N.W.T. 1988, c. R-2.

ON: *Reciprocal Enforcement of Judgments (U.K.) Act*, R.S.O. 1990, c. R.6.

PE: *Canada-United Kingdom Judgments Recognition Act*, R.S.P.E.I. 1988, c. C-1.

SK: *Canada-United Kingdom Judgments Enforcement Act*, S.S. 1988-89, c. C-0.1.

YT: *Reciprocal Enforcement of Judgments (U.K.) Act*, R.S.Y. 2002, c. 190.

Canada-France Convention on Recognition and Enforcement of Judgments in civil and Commercial Matters and on Mutual Legal Assistance in Maintenance (not in force)

MB: *Enforcement of Judgments Conventions Act*, C.C.S.M., c. E117.

ON: *Enforcement of Judgments Conventions Act, 1999*, S.O. 1999, c. 12, Sch. C. [No regulation yet made.]

SK: *Enforcement of Judgments Conventions Act*, S.S. 1998, c. E-9.13. [Not yet in force.]

Hague Conventions

Hague Convention on the Civil Aspects of International Child Abduction

AB: *International Child Abduction Act*, R.S.A. 2000, c. I-4.

BC: *Family Relations Act*, R.S.B.C. 1996, c. 128, Part 4.

MB: *Child Custody Enforcement Act*, C.C.S.M., c. C360, s. 17.

NB: *International Child Abduction Act*, S.N.B. 1982, c. I-12.1.

NL: *Children's Law Act*, R.S.N.L. 1990, c. C-13, s. 54.

NS: *Child Abduction Act*, R.S.N.S. 1989, c. 67.

NT, NU: *International Child Abduction Act*, R.S.N.W.T. 1988, c. I-5.

ON: *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 46.

PE: *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 28.

SK: *International Child Abduction Act, 1996*, S.S. 1996, c. I-10.11.

YT: *Children's Act*. R.S.Y. 2002, c. 31, Part 2, Div. 3.

Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption

BC: *Adoption Act*, R.S.B.C. 1996, c. 5, Part 4, Div. 2. See *Adoption Regulation*, B.C. Reg. 291/96 as am., Part 7.

AB: *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, Part 2, Div. 6. See Alta. Reg. 187/2004, Part 2.

MB: *Intercountry Adoption (Hague Convention) Act*, C.C.S.M., c. A3. See *Intercountry Adoption (Hague Convention) Regulation*, Man. Reg. 23/99.

NB: *Intercountry Adoption Act*, S.N.B. 1996, c. I-12.01.

NL: *Adoption Act*, S.N.L. 1999, c. A-2.1, s. 35.

NT, NU: *Intercountry Adoption (Hague Convention) Act*, S.N.W.T. 1998, c. 19.

NS: *Intercountry Adoption Act*, S.N.S. 1998, c. 15.See N.S. Reg. 118/99.

ON: *Intercountry Adoption Act, 1998*, S.O. 1998, c. 29.

PE: *Intercountry Adoption (Hague Convention) Act*, R.S.P.E.I. 1988, c. I-4.1. Dates from 1994.

SK: *Intercountry Adoption (Hague Convention) Implementation Act*. S.S. 1995, c. I-10.01.

YT: *Intercountry Adoption (Hague Convention) Act*, R.S.Y. 2002, c. 121.

Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters

Federal Courts Rules, R. 137(2) (service in a contracting state must be as provided by the convention), R. 212 (default proceedings)

Tax Court of Canada Rules, R. 42(5) (service in a contracting state must be as provided by the convention)

BC: Supreme Court Rules, R. 13(12)-(15) (service in a contracting state may be as provided by the convention or by other specified means)

AB: Alberta Rules of Court, Alta. Reg. 390/1968, R. 31.1 (service in a contracting state may be as provided by the convention or by other specified means)

MB: Court of Queen's Bench Rules, Man. Reg. 553/88, R. 17.05(1) (Authorizes service "in the manner prescribed by the law of the jurisdiction where service is made if that manner of service could reasonably be expected to come to the notice of the person to be served". Convention is not specifically referred to here, but it is referred to in R. 69, about entering default judgment when the originating process was transmitted abroad under the Convention.)

NB: Rules of Court, N.B. Reg. 82-73, R. 19.04(3) (service in a contracting state must be as provided by the convention), 21.10 (default judgment if service under the convention), App. E (the convention)

NL: Rules of the Supreme Court, 1986, S.N.L. 1986, c. 42, Sch. D. R. 6.08 (service in a contracting state may be as provided by the convention or by other specified means), 6.16 (default judgment if service under the convention)

NS: Civil Procedure Rules, R. 10.08(1)(b) (service as provided by the convention is mandatory for a state that has objected under art. 10 of the convention)

NT, NU: Rules of the Supreme Court of the Northwest Territories, N.W.T. Reg. 010-96, R. 50(2). (Document "may be served pursuant to the Convention, in which case service shall be effected in accordance with the internal law of the receiving jurisdiction unless the Court otherwise directs".)

ON: Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 17.05 (service in a contracting state must be as provided by the convention)

PE: R. 17.05(3) (service in a contracting state may be as provided by the convention or by other specified means)

SK: Queen's Bench Rules, R. 28(1)(c) and 29 (service in a contracting state may be as provided by the convention or by other specified means)

YT: Yukon uses the British Columbia Supreme Court Rules.

Hague Convention on the Law Applicable to Trusts and on their Recognition

AB: *International Conventions Implementation Act*, R.S.A. 2000, c. I-6, Part 1.

BC: *International Trusts Act*, R.S.B.C. 1996, c. 237.

MB: *International Trusts Act*, C.C.S.M., c. T165.

NB: *International Trusts Act*, S.N.B. 1988, c. I-12.3.

NL: *International Trusts Act*, R.S.N.L. 1990, c. I-17.

NS: *International Trusts Act*, S.N.S. 2005, c. 41.

PE: *International Trusts Act*, R.S.P.E.I. 1988, c. I-7.

SK: *Trusts Convention Implementation Act*, S.S. 1994, c. T-23.1.

Most of the provinces and territories have enacted legislation that enables courts dealing with non-Hague cases to order the return home of a child who has been wrongfully removed to or retained in the jurisdiction. The specific provisions are: *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 47; *The Child Custody Enforcement Act*, R.S.M. 1987, c. C360, s. 6; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 130.1; *Children's Law Act*, R.S.N. 1990, c. C-13, s. 48; *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 28 (applies in Nunavut also); *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 40; *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 16; *An Act Respecting the Civil Aspects of International and Interprovincial Child Abduction*, R.S.Q. c. A-23.01 (Quebec's legislation applies within Canada but when I last checked it was not in effect for cases involving other Canadian jurisdictions); *The Children's Law Act*, S.S. 1997, c. C-8.2, ss. 17 and 18; *Children's Act*, R.S.Y. 1986, c. 22, s. 49. When I last checked, Alberta and Nova Scotia had not enacted this kind of provision. For the provinces that don't have specific legislation, it may be possible to order return pursuant to a court's jurisdiction to make custody/access orders in the best interests of the child. This is what the SCC did in *W. (V.) v. S. (D.)*, [1996] 2 S.C.R. 108. In that case, the child was removed from the USA to Quebec. The SCC determined that the Hague Convention did not apply (because the removal was not "wrongful") but ordered return of the child on the basis that return was in the best interests of the child. Of course, this requires that the court have jurisdiction to make a custody/access order. I'd be grateful for any updates on Alberta, Nova Scotia and Quebec.