


## The 1996 and 1980 Hague Conventions



**The Hague Children's Conventions**

Protecting children across international frontiers.

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### 1980 Hague Child Abduction Convention

- The Convention was adopted in 1980 by the Hague Conference on Private International Law. As of October 12, 2017, there are **99** States Parties.
- Canada has been a party to the Convention since its entry into force internationally in December 1983. The Convention currently applies between Canada and 81 other States Parties.
- In Canada, provincial and territorial laws give effect to the Convention – *The International Child Abduction Act, 1996* in Saskatchewan.

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*Thailand, Ukraine, Russia - examples of states parties to whom Canada is not "a party" (why 81 r/199)*

*1. is not accepted other states' accession*

### Trivia

- Question 1 – full name of the 1980 Convention
- -Question 2 – full name of the 1996 Convention

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### 1980 Hague Child Abduction Convention

Main objectives:

- The prompt return of "wrongfully removed or wrongfully retained children" to the State of their habitual residence; this ensures that rights of custody and access of its States parties are effectively respected;
- To provide a procedure to organize or secure the effective exercise of rights of access;

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## Central Authorities

- Article 7 sets out the **role of C.A.s**:
  - Discover the whereabouts of a child
  - Prevent further harm to child
  - Provide info on the law of their State
  - Initiate or facilitate judicial or admin proceedings
  - Provide or facilitate legal advice
  - Provide for safe return of child
  - Keep other C.A. informed of the progress of the case

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## Central Authorities

- **C.A.s cannot**:
  - Give private legal advice or advocate for either parent
  - Engage in judicial bashing
  - Interfere in another country's legal system
  - Financially subsidize a case

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## Central Authorities

- **Role of C.A.s continued**:
  - Cooperate with other C.A.s
  - Attempt voluntary returns (Article 10)
  - Deal with applications for return, and transmit applications if child has moved out of the territory (Articles 8 and 9)
  - Act expeditiously (Article 11)
  - Inform of reasons for rejecting an application (Article 27)

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## Central Authority

- The Minister of Justice is the Central Authority for Saskatchewan.
- Kim Newsham and Suneil Sarai of the Ministry have been designated to carry out the duties of the Central Authority.

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## Prevention



- Check out *International Child Abduction: a Guidebook for Left-Behind Parents* on the [www.travel.gc.ca](http://www.travel.gc.ca) website
- Parent should clearly convey in writing that s/he does **not** consent to the child travelling outside Canada, or consents to travel for **limited** period of time – see sample consent letter

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## Passports


- **The Passport Program System Lookout (SL):**
  - If a child's name is on the SL, it alerts staff that additional review is required when processing the passport application.
- **However:**
  - It does not prevent the issuance of a passport if all application requirements have been met (and no travel or passports restrictions are contained in an order or agreement)
  - It will not cancel an existing valid passport or prevent a child from travelling outside of Canada
  - A child's name *can* not be added to SL if: 1) the request is from a non-custodial parent with unspecified access; 2) there is nothing preventing the issuance of the passport (i.e. no travel or passport restrictions)
  - If a passport is issued, the Passport Program will not ask for its return, even if custody, access, or travel restrictions have changed since its issuance.

See: <http://www.cic.gc.ca/english/passport/child/safety.asp>

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*- get passport surrendered to the Court not to opposing counsel*


## Prevention



- Contact Passport Program about putting the child on System Lookout List (for a Canadian passport)
- Is child a dual national?  
Is there another passport?

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## Prevention



CHILD ABDUCTION SECTION  
[www.hcch.net/en/instruments/conventions/specialized-sections/child-abduction](http://www.hcch.net/en/instruments/conventions/specialized-sections/child-abduction)

- If a parent suspects the other parent is planning to take the child to another country, determine whether the Convention would apply.
- If the Convention would apply, how does the foreign country apply it?

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*- recommended NOT allowing children to travel to Mex.co due to process to have child returned*

### Prevention

- Depending on the specific facts of the case, consider:
  - Whether mediation or a similar process might assist supporting the parent to remain in Saskatchewan; or
  - obtaining an order
    - with a non-removal clause and/or clause confirming child's habitual residence
    - Confirming the joint custody status of the parents
    - Requiring the parent to post a surety/bond/security
    - That all passports or other travel documents be surrendered to the court

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### Responding to Child Abduction

- If prevention efforts have not worked and a child is in a foreign county, or it is a situation of wrongful retention, contact the Central Authority.
- Assess whether the situation fits within the parameters of s. 282 or s. 283 of the C.C.

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- appln to change the existing custody order might affect the proceedings in the other State

### Prevention when child is *en route*

- Situations of wrongful removal without consent
- Does it meet the requirements of s. 282 or s. 283 of the *Criminal Code*? If so, report to local police immediately. Possibility of border alerts
- Parent should provide to police as much detail as possible about the intended destination and travel route

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### Responding to Child Abduction (Outgoing application)

- C.A. will provide a return application for the parent to complete, or you can access it at: <http://www.saskatchewan.ca/residents/justice-crime-and-the-law/child-protection/international-child-abduction>
- Completed application should include
  - birth certificate
  - recent photos
  - copy of any court order or agreement relating to custody
    - Where there is no order/agreement, C.A. can provide Declaration of Law.


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child or other parent parent

### Responding to Child Abduction (Outgoing application)


- Once the application is completed, the SK C.A. will check for completeness, and then transmit to the other country.
- Foreign C.A. will advise of the process and whether the applicant should be hiring a lawyer there, etc.
- SK C.A. can request updates, or request an explanation for delay (Article 11).

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*- usually 6 wk processing period*


### Incoming Applications

- We can provide information to either parent, their lawyer, and the other C.A.
- If child's location is unknown, we make a request to the police to attempt to locate the child. May also involve a request to CBSA, or requests to school boards, etc.

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### Responding to Child Abduction (Incoming Application)


- Situations where a child is improperly brought into Saskatchewan
- Parent may contact you to assist with a court application here
- When SK C.A. first receives an incoming application, we first attempt a voluntary return **unless** applicant has requested we do not
- We review the application and identify anything missing or incomplete and advise the other C.A.

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*- provide your name / address to Kim & you deal w Hague applns*

### Incoming Applications Acting for the Left-Behind-Parent

- Petition not required – can apply for return of the child using a Notice of Application.
  - Rules 15-69 to 15-77
- Include evidence regarding the key elements:
  - Does your client have a right of custody and was s/he exercising it?
  - Where was the child's habitual residence?
  - Is the child under 16?
- Article 12: Where the child has been wrongfully taken/retained and the application has been commenced less than a year after the taking, the court **shall order the return** forthwith.

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*if apln > 1 yr. after the taking the court MAY order the return of the child*

### Incoming Applications Acting for the Taking-Parent (TP)

- Can you disprove any of the key elements?
  - LBP not actually exercising custody or consented to the removal/retention – Article 13
  - Child objects to being returned to the State of habitual residence, and is sufficiently mature – Article 13 – consider requesting Hearing Children’s Voices report

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*It's a return to the habitual STATE not to the other parent*

### Incoming Applications Acting for the TP

- It has been more than one year since the wrongful taking/retention of the child and s/he is now settled in the new environment (Article 12) ---- court may still order a return but not obligated to do so
- Court of Appeal decision regarding “settled in her new environment”

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*2017 C.A.  
IVAKIC (?)*

### Incoming Applications Acting for the TP

Other potential defenses:

- Return would pose a grave risk that the child would suffer physical or psychological harm or otherwise place the child in an intolerable situation (Article 13)
  - Exception construed narrowly
- In the context of domestic violence, include evidence of abuse, and the type of abuse (situational vs coercive controlling), and evidence of what, if any, measures are available in the requesting State to provide protection to the TP and child

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*IF Coercive controlling abuse, more likely to succeed on the appln*

### Abduction to a non-Hague Country

- NOTE: this could include a State that has acceded to the Convention but Canada has not accepted their accession
- No official remedy (unless their domestic law so provides)
- Attempts at voluntary return can take the form of mediation, or the involvement of Consular Affairs

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### Abduction to a non-Hague Country

- Consular services may include:
  - Providing general information on local laws and procedures overseas;
  - Providing a list of lawyers in the country of abduction to the parent;
  - In cases with child welfare and protection concerns, requesting assistance from competent local authorities to conduct welfare visits to assess the child's health, safety, living conditions, with the consent of a parent or guardian; or
  - Liaising with TP and/or persons of influence as possible.

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### 1996 Hague Convention



The 1996 Hague Convention on the Protection of Children

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*- this is to SUPPLEMENT the 1980 convention*

### True or False?

- 1) The Hague Convention is primarily concerned with situation where children have been taken across the border from one country to the other. F
- 2) The Central Authority will act on behalf of a LBP in incoming applications. T
- 3) Under the Hague Convention, it is conceivable that a British court could make an order for the return of a child back to Canada, which could be followed by a SK court then making an order for the same child to go back and live in England. F
- 4) The Hague Convention is in force in 99 countries in the world. Canada applies the Convention with all of them. F
- 5) If it has been more than one year since the child was removed from a State, the left-behind parent can no longer bring a return application. F

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*False respecting custody rts*

### Why implement the 1996 Convention?

- The 1996 Convention reinforces the 1980 Convention:
  - primary role played by authorities in the child's habitual residence
  - enforceability of short-term orders made to protect the child without requiring a "mirror order"

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### Why? (cont.)

- Currently, if a party applies in some civil law countries for a divorce, and the child is habitually resident elsewhere, their court can still make an order for custody. There is no universally accepted conflict-of-laws regime in family law.
- Could result in conflicting custody orders, and delay.
- The Convention creates a common set of Rules to be applied by Contracting States.

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### Outline of the Convention

- Scope
- Jurisdiction
- Applicable Law
- Recognition
- Enforcement
- Co-operation

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### History of the 1996 Convention

- Canada played a key role in negotiating the Convention
- Convention came into force in January 1, 2002
- As of September 12, 2018, there are 49 Contracting States.
- Both Canada and the U.S. have signed the Convention (but not ratified)

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### Scope

#### Measures – Article 3

- attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;
- rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;
- guardianship, curatorship and analogous institutions;
- designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
- placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution;
- supervision by a public authority of the care of a child by any person having charge of the child;
- administration, conservation or disposal of the child's property.

This is not an exhaustive list.

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most of Europe are kn's states

will be ratified by each prov. - once approved by all provs, will be passed by Can. Each province needs to determine procedure / implementing legislation



## Scope

Article 4 - The Convention **does not apply to:**

- a) the establishment or contesting of a parent-child relationship;
- b) decisions on adoption;
- c) name and forenames of the child;
- d) emancipation;
- e) maintenance obligations;
- f) trusts or succession;
- g) social security;
- h) public measures of a general nature in matters of education or health;
- i) measures taken as a result of penal offences committed by children;
- j) decisions on the right of asylum and on immigration.

This is an exhaustive list.

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## Jurisdiction

- **General rule:** child's habitual residence for measures of protection for the child and his/her property (Article 5).
- "habitual residence" is not defined, but see the case law: [www.incadat.com/](http://www.incadat.com/)
  - lines up well with s. 15 of the CLA, however the definition of "habitual residence" would no longer apply in Convention cases

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## Scope

- Note: "measure of protection" = court order
- Applies to children up to the age of 18
- In SK, *The Children's Law Act*, *The Child and Family Services Act*, *The Public Guardian & Trustee Act*, *The Victims of Interpersonal Violence*, and *The Youth Detoxification (ETC) Act* fall within the scope of the Convention

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## Jurisdiction - Exceptions

- For refugees/displaced children or if habitual residence can not be determined: court in the State in which child is present can exercise jurisdiction. No other requirements.
- Note that the test under s. 15(3) of the CLA is not the same, and would not apply in Convention cases (possible amendment)

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### Jurisdiction - Exceptions

- wrongful removal or retention: does not change jurisdiction from the State of habitual residence unless:
  - Acquiesce or delay AND
  - It has been more than one year since the taking/ removal and the child is settled in his/her new environment AND
  - No application pending in the State of child's (former) habitual residence
    - Note CLA s. 15(4) test would no longer apply

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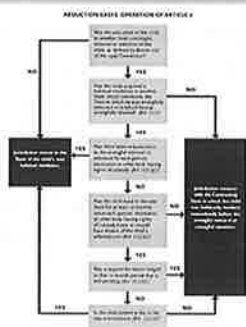
### Jurisdiction - Exceptions

- Urgency: a court in the state where the child is located may make an order for the child's protection. The order only stays in place until a court in the State of the child's habitual residence makes an order for the protection of the child
- Divorce or legal separation

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### Jurisdiction – Wrongful removal



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### Jurisdiction - Exceptions

- Transfer of jurisdiction: a court in the State having jurisdiction may ask a court in another State to take jurisdiction. OR a court in a State without jurisdiction may request jurisdiction be transferred to it.


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### Jurisdiction


Articles 8 and 9 jurisdiction may only be transferred if:

1. The child is connected to that State (nationality, location of property, parents' divorce; substantial connection).
2. The authority making the request must consider that this will allow for a better assessment of the child's best interests. The authority asked to assume or cede jurisdiction can only do so if it believes this is in the child's best interests.
3. Authorities of both Contracting States agree to the transfer (ie they have communicated).

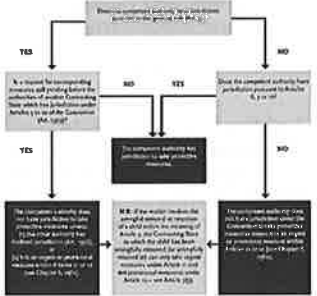

  
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### Scenario – Articles 7 and 5

- A child is wrongfully removed from Australia to SK. The LBP in Australia learns almost immediately that the child has been taken to SK. The TP in SK applies to court 8 months after the wrongful removal, asking for a custody order. Although the SK parent may have been able to argue that 8 months was either acquiescence or undue delay in bringing appropriate action under the CLA, under the 1996 Convention SK will not have jurisdiction to make a custody order.



  
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### Jurisdiction - Summary




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    graph TD
        A[Exercise summary jurisdiction? (Art. 5)] -- YES --> B[Is a request for transferring jurisdiction still pending before the authorities of another Contracting State which has jurisdiction under Article 10 or the Convention? (Art. 10)]
        A -- NO --> C[Does the competent authority have jurisdiction pursuant to Article 6 or 7?]
        B -- YES --> D[The Contracting State that has jurisdiction under Article 10 or the Convention has not yet made a decision on the request for transfer of jurisdiction. (Art. 10)]
        B -- NO --> E[The authority exercising jurisdiction has jurisdiction under Article 6 or 7.]
        C -- YES --> E
        C -- NO --> F[The Contracting State of the child's habitual residence or, if that State is not a Contracting State, the State of the child's nationality has jurisdiction under Article 6 or 7.]
        D --> G[If the mother makes the request, the exercise of jurisdiction is subject to the consent of the State of the child's habitual residence, unless Article 11 and paragraph 2 of Article 12 apply.]
        F --> G
        E --> G
        G --> H[The Contracting State of the child's habitual residence or, if that State is not a Contracting State, the State of the child's nationality has jurisdiction under Article 6 or 7.]
    
```


  
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### Scenario – Article 6

- A family resides in Greece. They are citizens of both Canada and Greece. The parents decide to move to the United States. They leave Greece with no intention of returning, and enter Canada to visit relatives on their way to the US. They remain in Canada for a couple months and the mother decides she wishes to remain there rather than continuing on with the father to the US. The 1996 Convention would allow the authorities of Canada to make an order for the protection of the child, such as a custody order.


  
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## Applicable Law

- **General Rule:** authorities apply their own law (Article 15 (1))
- Most SK legislation is silent about applicable law (exception: CJPTA)
- Exceptions are exceptional
- If habitual residence changes, use the law of the new habitual residence

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## Recognition - Exceptions

Orders made in another State will not be recognized if:

- There was no jurisdiction to make initial order;
- There was a violation of fundamental principles of procedure (parent or child not able to participate in proceedings);
- It is manifestly contrary to public policy

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*So, document how the  
some of the child's are  
factored in, or why  
child's wishes not  
considered*

## Recognition

- **General Rule:** Measures to be recognized by operation of law in all other Contracting States (i.e., without the need for any court order in the requested State)
- Can ask for advance recognition (ex. in relocation cases)
- Most SK legislation is silent re: recognition.
  - CLA speaks to recognition AND enforcement; CFSA addresses recognition of foreign permanent orders.
  - PGTA can recognize extra-provincial appointment of a property guardian for an adult, but Act is silent with respect to property guardians of children

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## Enforcement

- **General Rule:** simple and rapid procedure for measures requiring enforcement
  - Domestic law governs what enforcement measures are available and how they are implemented
- Section 17 of the CLA – recognition of foreign custody/access orders – judge can enforce OR make any new order. Under Convention, not possible to make a new order; court must enforce (using domestically available enforcement mechanisms) unless a exception is made out.

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## Enforcement - Exceptions

Same as for recognition:

- no jurisdiction,
- violation of fundamental principles of procedure,
- manifestly contrary to public policy

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## Scenario – Intersection of Conventions

- Marlene and Peter reside in the U.K. with their children aged 7 and 9. Peter takes the children to Saskatchewan, without notice to Marlene. He then advises Marlene he will not be returning to the U.K. Marlene can choose between proceeding under either Convention. As there is no UK custody order, Marlene decides it may be preferable to apply under the 1980 Convention based on her custody rights arising by operation of law. Marlene applies to the court in SK for a return order.

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## Scenario - Recognition

- A child from Montana is apprehended from her parents by child protection officials, and placed with her grandmother. The court in Montana subsequently terminates the parental rights of the child's biological parents and permanently commits the child to their child protective services, who confirm the child's placement with the grandmother. Grandma relocates to SK. Mom travels to SK and insists that as the parent, she can take her daughter whenever she wants. Authorities in SK recognize the Montana court order. Officials in SK apprehend the child from the biological mother and return the child to the grandmother without initiating court proceedings.

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## Co-operation

- Each Contracting State must designate a Central Authority to discharge the obligations of the Convention.
- As Canada is a federal state, a Central Authority must be designated by each province or territory to which the Convention extends in addition to a federal Central Authority.
- What will be the role of a Central Authority?

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### Reservations

- Contracting States may make a reservation with respect to the protection of property of children situated on their territory.

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### Trivia

- 4) An order from Belgium for the protection of a 17 year old, placing the child in the care of her grandparents temporarily, must be recognized and enforced in SK. (T/F)
- 5) A SK order which did not take into account the voice of child may not be recognized in another Contracting State. (T/F)

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### Trivia

- 1) Orders terminating parental responsibilities are within the scope of the 1996 Convention. (T/F)
- 2) What requirements must be met in order to transfer jurisdiction from the State with jurisdiction to another State?
- 3) A parent with a parenting order from England who moves to SK may use the order to register the child in a school without obtaining a SK order. (T/F)

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### Questions??

- Contact: Kim Newsham  
Ministry of Justice  
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kim.newsham@gov.sk.ca

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*best interest of child  
to have to communicate*



