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[20/10/1994; Supreme Court of Canada; Superior Appellate Court]
Thomson v. Thomson [1994] 3 SCR 551, 119 DLR 4th 253, 6 RFL (4th) 290

SUPREME COURT OF CANADA

CORAM: The Chief Justice and La Forest, L'Heureux-Dube, Sopinka,

Gonthier. Cory. McLachlin. Iacobucci and Major JJ.

20 October 1994

BETWEEN

A.T.

v.

P.T.

- and -

THE ATTORNEY GENERAL OF CANADA,

THE ATTORNEY GENERAL FOR ONTARIO and

THE ATTORNEY GENERAL OF MANITOBA

REASONS FOR JUDGMENT

LA FOREST J.:

This appeal raises for the first time in this Court the interpretation and application of the Hague Convention on the Civil Aspects of International Child Abduction, Can. T.S. 1983 No. 35, to which Canada is a party. The underlying purpose of the Convention, as set forth in its preamble, is to protect children from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence.

The case arises in a context where a baby boy born in Scotland of Scottish parents was taken by his mother to Canada in December 1992 to visit her parents in Manitoba. Once there, she decided to stay permanently. At the time of the removal of the child, she had been granted interim custody of the child following the breakdown of her marriage; the father had, however, been granted interim access, and the court order contained a prohibition against the child being taken out of Scotland. The principal question is whether the child should be returned to Scotland under the terms of the Convention or under other provisions of the Act

implementing the Convention in Manitoba, the Child Custody Enforcement Act, R.S.M. 1987, c. C360.

Facts

The appellant, A.T., and the respondent, P.T. were married in Scotland in February 1991. She was 17; he was 22. Their child, M., was born on March 22, 1992. From then until July 1992, they all lived with the husband's parents. In July 1992, they moved to their own rented accommodations. M., however, continued to live at his paternal grandparents home for part of the week; the rest of the week, he lived with his parents.

On Sunday, September 27, 1992, the child was due to be returned from his grandparents but was not. Three days later, he had still not been returned. This precipitated a fight between his parents, and they agreed to separate. The child remained with his paternal grandparents.

Each parent sought custody of M. The mother's application was heard before the Stranraer Sheriff Court in Scotland on October 9, 1992; both parties were represented. A solicitor was appointed by the court to report on the circumstances of the child. The report indicates, among other things, that the mother was the more suitable parent, and had more drive and ambition than the father; that all parties were on welfare; that when M. was in the custody of his father, it was his paternal grandmother who cared for him; and that it was acceptable to the father that M.'s grandmother bring up the child.

The Sheriff granted the appellant wife interim custody of M. on November 27, 1992. He also granted the respondent interim access and ordered that the child remain in Scotland pending a further court order (the court had evidence that the mother had been thinking of going to Canada to live with her parents who had recently emigrated). Neither party appeared in person at the hearing. The appellant later deposed that when she talked to her lawyer after the hearing, the lawyer was in a hurry, and told her only "We won! You have custody of M.", and that Mr. T. had been granted visitation rights. The lawyer is alleged to have told the appellant that she would provide a report detailing the court's decision in a "few days". On December 2, 1992, without receiving this report, the appellant left Scotland with M. to visit her parents in Manitoba.

Some time during the next two months, the appellant formed the intention to remain with her child in Manitoba. She enrolled in a Canadian high school and, she deposed, planned to pursue higher education after graduation. Meanwhile, she and M. lived on the family farm near Wawanesa, Manitoba.

On February 3, 1993, the appellant applied for custody of M. in Manitoba. The same day, the custody hearing resumed in Scotland. At the latter hearing, the respondent husband was granted an order of custody. The appellant later deposed that she did not know of this Scottish custody hearing; she did not attend it; nor did she provide instructions to the lawyer who had represented her before. Consequently, her counsel was allowed to withdraw at the hearing. The record disclosed only that the respondent and his mother presented evidence.

On February 95, 1993, the respondent launched a request for the return of the child under the Hague Convention on the Civil Aspects of International Child Abduction. The application was filled out in a manner that, as we shall see, appears to denote a misunderstanding of the Convention's language and requirements. In the letter accompanying the request, the Scottish central authority (i. e., the body designated in Scotland for dealing with applications under the Convention) stated that "Under the common law of Scotland, married parents of a child have joint rights of custody unless a court orders otherwise." Later in the document, under the space for "Requesting Individual

or Institution (who actually exercised custody before the removal or retention)" was written the name of the appellant, A.T. Still later, under "Factual or Legal Grounds Justifying the Request", was written "P.T. has legal custody of child as confirmed by order of Stranraer Sheriff Court on February 3, 1993". As will become apparent, the procedure followed seems to be more consonant with the language and requirements of the European Convention dealing with the matter in the European Economic Community. That approach is not uncommon, at least for British requests under the Hague Convention. It can, however, result and has here resulted in difficulties in relation to the return of the child from Canada.

In March 1993, the respondent replied to his wife's application for custody in Manitoba with an application under the Child Custody Enforcement Act and under the Convention for the return of the child to Scotland. Shortly afterwards, in April 1993, Mrs. T. unsuccessfully appealed the custody order in Scotland (it seems that she instructed her counsel over the telephone and did not personally appear). The reasons for the dismissal of the appeal were not part of the record.

Relevant Convention and Statutory Provisions

For ease of reference, I set forth here the relevant provisions of the Convention and the Act:

> **Convention on the Civil Aspects of International Child Abduction, Can. T.S. 1983, No. 35**
>
> **[Preamble]**
>
> **The States signatory to the present Convention,**
>
> **Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,**
>
> **Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,**
>
> **Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions:**
>
> **Article 1**
>
> **The objects of the present Convention are--**
>
> **(a) to secure the prompt return of children wrongfully removed to or retained in any contracting State; and**
>
> **(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.**
>
> **Article 3**
>
> **The removal or the retention of a child is to be considered wrongful where--**
>
> **(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and**

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 5

For the purposes of this Convention--

(a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

. . .

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that--

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) 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.

The judicial or administrative authority may also refuse to order the return of the child if it 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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

Article 21

An application to make arrangements for organizing or, securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject.

The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

Child Custody Enforcement Act, R.S.M. 1987, c. C360

3. A court on application shall enforce, and mav make such orders as it considers necessary to give effect to, a custody order made by an extra-provincial tribunal as if the custody order had been made by the court unless it is satisfied on evidence adduced that the child affected by the custody order did not, at the time the custody order was made, have a real and substantial connection with the province, state or country in which the custody order was made.

4(1) Notwithstanding the existence of a custody order affecting a child made by an extra-provincial tribunal, a court on application may make a custody order in respect of the child that differs from the custody order made by the extra-provincial tribunal, if it is satisfied

(a) that the child affected does not, at the time the application is made, have a real and substantial connection with the province, state or country in which the custody order made by the extra- provincial tribunal was made or was last enforced; and

(b) that the child has a real and substantial connection with Manitoba or all the parties affected by the custody order are habitually resident in Manitoba.

5 Notwithstanding any other provision of this Act, where a court is satisfied that a child would suffer serious harm if the child remained in or was restored to the custody of the person named in a custody order made by an extra-provincial tribunal, the court may make a custody order in respect of the child that differs from the custody order made by the extra-provincial tribunal.

6 Upon application, a court,

(a) that is satisfied that a child has been wrongfully removed to or is being wrongfully retained in Manitoba; or

(b) that may not exercise jurisdiction under section 4, may do any one or more of the following:

(c) Make such interim custody order as the court considers is in the best interests of the child.

(d) Stay the application subject to,

(i) the condition that a party to the application promptly commence or proceed expeditiously with a similar proceeding before an extra-provincial tribunal, or

(ii) such other conditions as the court considers appropriate.

(e) Order a party to return the child to such place as the court considers appropriate and, in the discretion of the court, order payment of the cost of the reasonable travel and other expenses of the child and any parties to or witnesses at the hearing of the application.

17(1) In this section "convention" means the Convention on the Civil Aspects of International Child Abduction set out in the Schedule hereto.

17(2) On, from and after December 1, 1983, the convention is in force in Manitoba and the provisions thereof are law in Manitoba.

17(3) The Department of the Attorney-General shall be the Central Authorits for the province for the purpose of the convention.

The Courts Below

Manitoba Court of Queen's Bench, Family Division (1993), 87 Man. R. (2d) 68

The husband's application for the return of the child was heard by Davidson J. of the Manitoba Court of Queen's Bench both under the terms of the Convention and under provisions in its implementing Act, the Child Custody Enforcement Act of Manitoba.

At the outset, Davidson J. stated that she was prepared to recognize the orders of the Scottish courts and dealt with the objections raised to them in the following manner. Whether or not the appellant knew of the non-removal clause in the interim order of November 27, 1992, Mrs. T. did know of the access provisions contained in that order and chose to ignore them. In addition, Davidson J. found that Mrs. T. was wilfully blind to the proceedings she had instituted in Scotland, and that she failed to return the child once she became aware of the contents of the orders of the Scottish court of November 27, 1992 and February 3, 1993.

Davidson J. held that both the Convention (Article 12) and the Act (s. 6) required her to start from the position that she should enforce orders from other jurisdictions except in limited circumstances. The former (with which I am principally concerned) reads:

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

Davidson J. had no difficulty holding that the child had substantial connections with Scotland and not with Manitoba as contemplated by ss. 3 and 4(1) of the Act. Under these circumstances she obviously did not find it necessary to consider whether he "was habitually resident [in Scotland] immediately before the removal or retention" as required by Article 3 (a) of the Convention. She simply turned to a consideration of whether any of the exceptions to a requirement to return in the Convention (Article 13) or the Act (s. 5) were applicable.

The latter question involved whether the child had suffered harm of the nature described in Article 13 of the Convention or s. 5 of the Act sufficient to warrant a refusal to return the child. She noted that the requisite harm was expressed differently in the two provisions. Article 13 spoke of a "grave risk" that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, whereas s. 5 merely referred to the fact that the child would "suffer serious harm". However, she concluded that whatever test was used. it was not satisfied on the evidence. The appellant's affidavits, she observed, were worded in terms of the "best interests" of the child, and Davidson J. concluded that the appellant truly saw the issue of whether the child should remain in Canada as a best interests issue, rather than harm as contemplated by the Act or the Convention.

Davidson J. further rejected the argument that she was required to direct a trial on the issue of harm and not decide the matter herself on the basis of affidavit material. While, she noted, a trial of the issue had been ordered by the Manitoba Court of Appeal in Lavitch v.

Lavitch (1985), 37 Man. R. (2d) 261, that case had dealt with children who were 12 and 13 years old and their ambivalence about resuming a relationship with their father had to be considered in determining whether their return would cause them serious psychological harm. However, Davidson J. continued, the court in that case had indicated that where children were of such a tender age that their objection should not be a factor and no serious question of a risk of harm arose, it would be appropriate for the judge to make the order without requiring a trial of the issue. That was the situation in the case before her.

Davidson J. then dealt with the appellant's contention that the child was not wrongfully removed within the meaning of Article 3 of the Convention, which I repeat:

Article 3

The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Custody and access are thus defined in Article 5:

Article 5

For the purposes of this Convention:

(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Davidson J. held that the appellant's custody right was a restricted one, which took away her right to determine the child's place of residence. Hence, by removing M., Mrs. T. had breached a term of her right of custody, and thus his removal was wrongful within the terms of the Convention. The removal being wrongful, the subsequent retention was also wrongful. In obiter, Davidson J. rejected the appellant's argument that, by the time of the February 3, 1993 order in Scotland, the child was habitually resident in Manitoba.

On this basis, Davidson J. ordered the return of the child to Scotland. She then went on to consider the terms and conditions of the return that could be dictated by a Manitoba court under s. 6(c) of the Child Custody Enforcement Act. In her view, that provision allowed her to make such interim custody order as would be in the best interests of the child. While on the evidence before her she believed it would, in the long-term, be in M.'s best interests to remain in the custody of his mother, the issue was for the Scottish courts to determine. She thought, however, that on an interim basis it was clearly in the best interests of the child that he not be abruptly removed from his mother's care. On that basis, she ordered that interim custody of the child be granted to Mrs. T., but that the child was to be returned to the

jurisdiction in Scotland where the order was made. To ensure that Mrs. T. proceeded expeditiously to have matters resolved in Scotland, Davidson J. further ordered that her interim custody order would expire in four months.

Manitoba Court of Appeal (1993), 88 Man.R. (2d) 204

On the appeal to the Court of Appeal. Twaddle J.A., for the majority, first disposed of the argument that the Manitoba court required formal proof of the Scottish order to give the Manitoba court jurisdiction. The Act, he noted, expressly provides that the court may take notice of such orders. He had no more difficulty with the issue of the residence of the child, whether considered in terms of the Convention or the specific provisions of the Act. Like Davidson J., he held that the child was a resident of Scotland and not Manitoba.

On the issue of wrongful removal, Twaddle J.A. held that while the wife might well be technically right in her contention that the child was not wrongfully removed, since she alone was the custodial parent, the point was somewhat academic since the child was clearly wrongly retained in Manitoba once the custody order in favour of the father was made.

Turning then to the exceptions to the requirement to return the child in the Act and the Convention, Twaddle J.A., at p. 208, quoted what he had said in Lavitch, supra, at p. 265:

In the case of an application to enforce the order of a jurisdiction bound by the Convention, a court might allow for the differences between the Act and the Convention by construing the Act broadly to give effect to the tenor and plain intent of the Convention, the provisions of which, as I have already noted, are law in Manitoba.

He then added:

In the result, the exceptions in the Act and those in the Convention must be read together. As 'serious harm' to the little boy in this case would necessarily be preceded by a grave risk of harm to him, it is only necessary to consider the exceptions set out in the Convention.

The mother had sought to introduce new evidence before the Court of Appeal from a medical doctor specializing in developmental pediatrics regarding the harm the child would suffer by being removed from his primary caregiver, but the court refused categorizing the evidence as "irrelevant" for the following reasons (at pp. 208-9):

The risk contemplated by the Convention must come, in my opinion, from a cause related to the return of the child to the other parent. This construction is required both by the language of the Convention and by the consequence of construing it otherwise.

. . .

At least in the case of a child of tender years, an extra-territorial order of custody, could never be enforced if the risk of harm from the removal of the child from its present caregivers was to be allowed for. It is almost always that the removal of a very young child from its immediate environment, or from those with whom the child has become familiar, will cause some temporary psychological trauma. Those who signed the Convention could not have intended this as a ground for not enforcing an order. Such a result would negate the Convention's purpose.

Twaddle J.A. continued that although the guiding principle in all matters dealing with the custody of a child is that the adjudicating court must take the order which is in the best interests of the child, the parties to the Convention have agreed that the concurrent exercise

of custody jurisdiction is not in the best interests of a child (pp. 209-10). As regards judicial comity, he held that if the Convention is fully applicable, the court in the requested state must accept the other court's order as having been made in accordance with the guiding principle. That court, he added, must also accept that the child's future welfare will be safeguarded by the court in its home jurisdiction.

Finally, Twaddle J.A. found that the remedies available under s. 6 of the Act give more flexibility than the requirement in Article 12 of the Convention, which requires that the child be returned "forthwith". He noted that, although the Scottish court purported to have given a "final" order, from which the appellant's appeal was dismissed, the case had never been heard on its merits, and it was probable that the Scottish court would wish to do this. However, he doubted that this event would transpire until the appellant returned the child to Scotland. Thus he ordered the return of the child forthwith, and chided Davidson J. for having given an order "worded in such a way as to suggest that it is intended to have continued effect after the child's return to the foreign jurisdiction" (p. 212).

The dissenting judge, Helper J.A., took a different approach to the issue of whether there had been a wrongful removal of the child from Scotland. In her view, the Scottish court had retained its jurisdiction to determine custody, and it was for that reason that the removal from Scotland was wrongful.

Helper J.A.'s reasons are otherwise largely confined to the terms of the order to return the child to Scotland. Reading the obligation to return in Article 1 of the Convention in the light of its preamble, which recognizes the paramount importance of the interests of children along with the desire to protect children internationally from their wrongful removal, she held that the governing principles are twofold: the recognition and enforcement of extraprovincial custody orders, and the protection of the best interests of children.

The Act, she thought, gave effect to these principles. The interim procedures set out in s. 6 of the Act, she held, allow a Manitoba court to take cognizance of the welfare of children while still observing the requirements of the Convention to return children to the state of their habitual residence. She stated, at p. 215:

. . . children must not be made to suffer twice over as a result of their parents' wrongdoing. In giving effect to extra-provincial custody orders, courts must recognize that a possible by-product of the black letter application of the Act and the Convention is undue stress and, in some cases, actual trauma suffered by young children who have no voice in the courtroom. The corollary to the direction in the Convention that the signatories wish to protect children from the harmful effects of their wrongful removal or retention is the reality that children must also be protected from harmful changes that are incomprehensible to them.

The combined effect of the Scottish and Manitoba orders here would be M.'s removal from his mother's care immediately upon his return to Scotland to be placed with his father and cared for by his grandparents, now strangers to him. M. would not be well served by thus allowing, him to be bounced between caregivers. Accordingly. Helper J.A. would have ordered that the appellant be awarded interim custody, that the respondent's application be stayed until he agreed to allow the appellant interim custody in Scotland while she proceeded with a custody application there, and that the appellant be directed to commence a custody application in Scotland within two months.

The Appeal to this Court

The appellant sought and was granted leave to appeal to this Court. The leave application and the hearing of the appeal were both heard on an expedited basis, and judgment was

rendered immediately after the hearing dismissing the appeal subject to undertakings made by the respondent to which I shall later refer. That judgment was given with reasons to follow. These are the reasons.

The case raises a number of broad issues regarding the purpose, application and interpretation of the Convention and its interrelationship with the Act implementing it in Manitoba. It also raises several more specific issues relating to:

(1) the nature of the custody required by the Convention and whether there was custody sufficient to trigger the operation of the Conventionin this case;

(2) whether the child had been wrongfully removed from Scotland or wrongfully retained in Manitoba so as to bring the case within the operation of the Convention;

(3) whether the return of the child would cause harm to the child sufficient within the terms of the Convention or the Act to warrant refusal to return him; and

(4) the power of a court to which the application for return is made to accord remedies to ameliorate difficulties the child might incur from the return.

I shall begin with the general issues concerning the Convention, then deal with the particular issues before returning to the interrelationship betweenthe Convention and the Act.

Background to the Hague Convention

By the mid-1970s, the problem of international parental child abduction had reached such proportions that the Commonwealth Law Ministers described it as being of "immense social importance and requiring concrete early action" (Hague Conference on Private International Law, Actes et Documents de la Quatorzieme session, t. III, Child Abduction (1982) (hereinafter "Actes et Documents"), at p. 15, n. 6). At a meeting of a Special Commission of the Hague Conference on Private International Law held in January 1976, the Expert of Canada proposed that the Hague Conference undertake the preparation of an international treaty dealing with the problem of the abduction of children by one of their parents. The proposal was received with interest, and the Hague Conference Secretariat proceeded with a study of the legal and social aspects of the problem. A 1978 international study conducted bv the Permanent Bureau of the Hague Conference on Private International Law was informed of the following reported cases of abductions: Australia (10), Belgium (15), Denmark (8), France (75); the scale of the problem in the United Kingdom was indicated by the fact that in a 12 month period the Home Office was asked to take precautions in airports and ports in 691 cases involving 69 different countries; see A. E. Anton, "The Hague Convention on International Child Abduction" (1981), 30 Int'l & Comp. L.Q. 537. Though, as Anton has pointed out, these numbers were relatively small, the risk of harm to the child and the certainty of distress to the parents made it imperative that governments coordinate their efforts to prevent this evil. At all events, the numbers showed signs of increasing. For example, between 1982 and 1984 (the United States did not implement the treaty until 1988), the number of American citizens seeking the return of abducted children from abroad doubled, and in 1986 there were 276 reported cases of parental child abduction in the United States; see C. S. Helzick, "Returning United States Children Abducted to Foreign Countries: The Need to Implement the Hague Convention on the Civil Aspects of International Child Abduction" (1987), 5 Boston U. Int'l L.J. 119.

In March 1979 the Conference convened a Special Commission to examine the matter and to consider possible solutions. At a further meeting of the Special Commission in November

1979 a preliminary draft Convention was prepared which formed the basis for discussion at the Fourteenth Session of the Hague Conference in October 1980.

At that session representatives of 28 states prepared a draft Convention on the Civil Aspects of International Child Abduction which the Conference adopted by a unanimous vote on October 24, 1980. The Convention was immediately made available for signature by states, and Canada was one of four states to sign it on October 25, 1980. Scotland implemented the Convention in 1986.

In Canada, effect was given to the Convention by provincial statutes. Manitoba, we saw, made it part of its law by virtue of s. 17 of its Child Custody Enforcement Act which contains other provisions for the enforcement of extraprovincial orders. I shall refrain here from discussing the interrelation between the provisions of the Convention and the Act, but before getting into the specific issues raised by the parties, it is useful to make a few general remarks about the interpretation of international treaties and conventions adopted in domestic legislation.

Structure and Interpretation

By and large, international treaties are interpreted in a manner similar to statutes. This is evident from a perusal of Article 31 of the Vienna Convention on the Law of Treaties. Can. T.S. 1980 No. 37, which reads:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty: . . .

There is a significant difference, however, in the use that may be made of the legislative history and other preparatory material. Article 32 provides that such material can be used to confirm the meaning found under Article 31, or to resolve an ambiguity or obscurity or avoid a result that is manifestly absurd or unreasonable. It reads:

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

It would be odd if in construing an international treaty to which the legislature has attempted to give effect, the treaty were not interpreted in the manner in which the state parties to the treaty must have intended. Not surprisingly, then, the parties made frequent references to this supplementary means of interpreting the Convention, and I shall also do so. I note that this Court has recently taken this approach to the interpretation of an international treaty in Canada (Attorney General) I. Ward, [1993] 2 S.C.R. 689.

The travaux preparatoires to the Hague Convention are found in the Hague Conference on Private International Law Actes et Documents, supra. Also of interest is the article by Anton, chair of the Special Commission, "The Hague Convention on International Child Abduction", supra.

I now turn to a closer examination of the purpose of the Convention. The preamble of the Convention thus states the underlying goal that document is intended to serve: "[T]he interests of children are of paramount importance in matters relating to their custody". In view of Helper J.A.'s remarks on this matter, however, I should immediately point out that this should not be interpreted as giving a court seized with the issue of whether a child should be returned the jurisdiction to consider the best interests of the child in the manner the court would do at a custody hearing. This part of the preamble speaks of the "interests of children" generally, not the interest of the particular child before the court. This view gains support from Article 16, which states that the courts of the requested state shall not decide on the merits of custody until they have determined that a child is not to be sent back under the Convention. I would also draw attention to the fact that the preamble goes on to indicate the manner in which its goal is to be advanced under the Convention by saying:

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access . . .

The foregoing is entirely consistent with the objects of the Convention as set out in its first Article. Article 1 sets out two objects: (a) securing the return of children wrongfully removed to or retained in any contracting state; and (b) ensuring that the rights of custody and access under the law of one contracting state are effectively respected in other contracting states. Anton, supra, at pp. 542-43, indicates that prompt return was intended to be predominant:

The Special Commission also considered - and, until recently, this would have been an equally novel proposition for judges in common law countries - that the courts of the State addressed should order the return of the child, subject to certain limited exceptions, despite the possibility that further inquiries might disclose that the child's welfare would be better secured by its remaining in that State. . . . [T]he primary purpose of the Convention [is], namely, as Article 1 (a) states, to secure the prompt return of children wrongfully removed to or detained in a Contracting State. The Commission started from the assumption that the abduction of a child will generally be prejudicial to its welfare. It followed that, when a child has been abducted from one country to another, international mechanisms should be available to secure its return either voluntarily or through court proceedings.

It is clear from the wording of the preamble and Article 3 of the Convention, cited supra, and from the travaux preparatoires that the primary object of the Convention is the enforcement of custody rights. Article 3 provides that the removal or retention of a child is to be considered wrongful where "it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone. under the law of the state in which

the child was habitually resident immediately before the removal or retention". Such rights of custody are given effect through proceedings for the return of the child under Article 12.

By contrast, the Convention leaves the enforcement of access rights to the administrative channels of Central Authorities designated by the state parties to the Convention. The duties of these central authorities, set forth in Article 21, are, unlike situations involving custody rights, not to return the child forthwith, but rather to cooperate "to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject", including the initiation of or assistance "in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject".

Custody

Custody, as understood by the Convention, is a broad term that covers the many situations where a person lawfully has the care and control of a child. The breach of rights of custody described in Article 3, it will be remembered, are those attributed to a person, an institution or any other body by the law of the state where the child was habitually resident immediately before the removal or retention. Article 3 goes on to say that custody may arise by operation of law. The most obvious case is the situation of parents exercising the ordinary care and control over their child. It does not require any formal order or other legal document, although custody may also arise by reason of a judicial oradministrative decision, or by agreement.

From the preparatory work, it seems clear, at least in some cases, that the removal of a child from a country in the face of a court order prohibiting it was intended to be covered by the Convention. Thus in the Preliminary Document No. 1 "Questionnaire and Report on international child abduction by one parent" (the "Dyer Report"), a survey of conference members was conducted in which five types of situations considered to constitute "child abduction" for the purposes of the questionnaire were described. I set them forth here, noting that the fifth is directly relevant:

A The child was removed by a parent from the country of the child's habitual residence to another country without the consent of the other parent, at a time when no custody decision had yet been handed down but serious problems between the parents already existed.

B The child was abducted by a parent from the judicially determined custodian in one country and removed to another, where no conflicting custody decision had been handed down.

C The child was retained by the non-custodial parent or other relatives beyond a legal visitation period, in a country other than that in which the child habitually resided.

D The child was abducted by a parent from the legal custodian in one country and removed to another, where the abductor has been granted custody under a conflicting order in that other country or in a third country.

E The child was removed by a parent from one country to another in violation of a court order which expressly prohibited such removal. [Emphasis added.]

(Actes et Documents supra, at p. 9.)

Preliminary Document No. 5 "Conclusions dragon from the discussions of the Special Commission of March 1979 on legal kidnapping", in referring to the five types of abductions

mentioned in the Dyer Report's survey, expresses the view that "the Convention should cover all types" (Actes et Documents, supra, at p. 163 (emphasis in original)).

It by no means follows, however, that the Convention applies to every case where a child is removed from one country to another where a court order prohibits it. From the emphasis placed in the Convention and the preparatory work on the enforcement of custody, as distinguished from mere access, the proper view would appear to be that the mandatory return dictated by the Convention is limited to cases where the removal is in violation of the custody rights of a person, institution or other body. That is the view adopted by Anton, supra, at pp. 546 and 554-55, who stated:

It is clear also from the definitions of custody and access in Article 5 that the removal or retention of a child in breach merely of access rights would not be a wrongful removal or retention in the sense of Article 3.

The Convention contains no mandatory provisions for the support of access rights comparable with those of its provisions which protect breaches of rights of custody. This applies even in the extreme case where a child is taken to another country by the parent with custody rights and is so taken deliberately with a view to render the further enjoyment of access rights impossible.

Anton's view gains support from the fact that the other four types of situations identified in the Dyer Report's survey as constituting "child abduction" are all of a kind where the custodial parent is deprived of her or his right of custody.

In my view, that is the correct approach and, accordingly, I propose to deal with the issue of whether there was a wrongful removal of M. on this basis.

Wrongful Removal

Before turning to the issue of whether there was an infringement of custody rights warranting the return of M. under the Convention, I would like to dispose briefly of two issues that were raised in the courts below.

The first of these concerns the possibility that the appellant did not know she was violating the Scottish court's order. In my view, this is irrelevant. Nothing in the nature of mens rea is required; the Convention is not aimed at attaching blame to the parties. It is simply intended to prevent the abduction of children from one country to another in the interests of children. If the removal of the child was wrongful in that sense, it does not matter what the appellant's view of the situation was.

The second preliminary issue relates to the dispute regarding whether M.'s residence was in Scotland or in Manitoba at the relevant time. On the facts of this case. I agree with the courts below that this issue is also without substance.

I turn then to the issue of whether there was a removal of M. from Scotland constituting a breach of custody rights there. The appellant argued that M.'s removal cannot be considered wrongful under the Convention because the appellant had interim custody. For the respondent, reference was made to the letter of the central authority in Scotland that a parent had custody of a child until a court ordered otherwise. The difficulty, however, is that before M.'s removal from Scotland, there was a court order awarding interim custody to his mother, leaving the respondent father with a mere right of access. Under these circumstances, the Court must determine what the law is as best it can by reference to relevant decisions.

Three approaches have been taken in the case law. Common to all three is that the courts have shown a strong disposition to give effect to the spirit of the Convention. The first is to the effect that a removal in breach of a non-removal clause is contrary to the terms of the Convention because such a removal is in breach of the custodial parent's own right of custody. This is arguably the approach adopted by Davidson J. in the present case. She stated. at p. 76:

. . . the removal was in breach of rights of custody in the November 27, 1992, order because the custody awarded to Ms. T. was not unconditional. I see non removal restrictions generally as a term of custody.

Further, rights of custody are specifically defined in article 5 as 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". Ms. T. was clearly given rights of custody which restricted her right to determine the child's place of residence and she is clearly in breach of that restricted right of custody.

A similar approach was adopted by Ewbank J. of the English High Court (Family Division) in Re K. H. (A Minor) (Abduction), [1990] F. C. R. 990. In that case, the parents of an infant daughter, residing in Ontario, separated, and the mother gained interim custody of the child but with the condition that the child was not to be removed from Ontario without leave of the court. In violation of this clause, the mother brought the child to England. On the request of the English court under Article 15, the office of the Attorney General in Ontario sent a certificate and an affidavit, stating its opinion of the effect of the non-removal clause under Canadian law. Accepting this submission, Ewbank J. summarized the Attorney General of Ontario's view as follows, at p. 992:

. . . it is the opinion of the Crown Law Officer that the mother's conduct in removing the child from the Province of Ontario constituted a wrongful removal within the meaning of Article 3 of the Convention in that it was a breach of the rights of custody attributed to her under the law of the Province by reason of a judicial decision. Her rights of custody under the order of September 19, 1989 were rights of custody within the Province of Ontario which specifically provided by the order of the court that the child was not to be removed from Ontario, and in removing the child the mother was in breach of the rights of custody which she had been granted. [Emphasis added.]

I confess to having some discomfort with this approach. By providing that "at the time of removal or retention those rights [of custody] were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention", Article 3 would seem to imply that the rights breached must have belonged to someone other than the breaching party. That reading is confirmed by the structure of the Convention as well as by the comments of those engaged in the drafting of the Convention, from which it appears that primary protection to custody rather than access was intended.

It must, however, be remembered that the request for return in this case appears to have been based on the approach set forth in the cases just cited. Mrs. T., the request reads, was the person whose custody rights were breached. The validity of this approach, I noted, was contested on a substantive basis, but it was never argued that it vitiated the request for the return of the child as such. For my part, I do not think one should insist on technical precision in matters of form, given the difficulty institutions in various countries may have in knowing precisely what the courts in another country may require. Here the request adequately informed the courts of the situation, whatever its form or whatever the theory under which the requesting state was acting, and I think the request was properly acted

upon. This is all the more compelling because on the basis of the statement of law given by the Canadian authorities in Re K H., supra, there was reason for the authorities in Scotland to think they were acting in accordance with Canadian law.

The second and third approaches mentioned hold that "the right to determine the child s place of residence" is a custody right divisible from the right to care for the person of the child, and by virtue of a non-removal clause, this right vests in either the access parent (the second approach), or the court (the third approach). These approaches gain support from the open-ended wording of Article 5: ""rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence" (emphasis added).

In C. v. C. (Minor. Abduction: Rights of Custody Abroad), [1989] 2 All E.R. 465 (C.A.), the court accepted the second approach, that the access parent (the father) gained a right of custody within the meaning of the Convention. There, the parties had married in England in 1978 and moved to Australia in 1979. In 1982 they became the parents of a son. They separated in 1986. A consent order made by the Australian Family Court directed that the father and the mother were to remain joint guardians of the child, the mother to have day-to-day custody; neither parent was to remove the child from Australia without the consent of the other. In 1988 the mother removed the child to England without the father's consent. The English Court of Appeal, while not presented with any evidence of Australian law, noted that, under Article 3 of the Convention, custody rights are specifically recognized as being held either jointly or alone. Neill L.J. thus put the matter, at p. 472:

I am satisfied that this right to give or withhold consent to any removal of the child from Australia, coupled with the implicit right to impose conditions, is a right to determine the child's place of residence. and thus a right of custody within the meaning of arts 3 and 5 of the convention. I am further satisfied that this conclusion is in accordance with the objects of the convention and of the 1985 Act. Until last August this child was habitually resident in Australia. In 1986 the Family Court of Australia made orders relating to his custody. which included an agreed provision that he should not be removed from Australia without the father's consent. In my judgment. the enforcement of that provision falls plainly within the objects which the convention and the 1985 Act are seeking to achieve.

Lord Donaldson M.R. concurred, stating at p. 473:

'Custody, as a matter of non-technical English, means 'Safe keeping, protection; charge, care, guardianship' (I take that from the Shorter Oxford English Dictionary); but 'rights of custody' as defined in the convention includes a much more precise meaning, which will, I apprehend, usually be decisive of most applications under the convention. This is 'the right to determine the child's place of residence'. This right may be in the court, the mother, the father, some caretaking institution, such as a local authority, or it may, as in this case, be a divided right, in so far as the child is to reside in Australia, the right being that of the mother but, in so far as any question arises as to the child residing outside Australia, it being a joint right subject always, of course, to the overriding rights of the court. If anyone, be it an individual or the court or other institution or a body, has a right to object, and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the convention. I add for completeness that a 'right to determine the child's place of residence' (using the phrase in the convention) may be specific, the right to decide that it shall live at a particular address, or it may be general, be. 'within the Commonwealth of Australia'.

That case presented more compelling facts than the present case. There, it will be observed, the parents were joint guardians under an agreed provision that the child should not be removed from the country. Here the father under the court order appears to have had only a right of access, which the Convention does not equate with custody.

The third approach, that the effect of the insertion of a non-removal clause in an interim custody order is to retain a right of custody in the court, was adopted by the English Court of Appeal in B. v. B. (Abduction: Custody, Rights), [1993] 2 All E.R. 144. There, the mother and father married in England in 1977 and moved to Ontario in 1981, where they became Canadian citizens. Their son was born in 1985. The parties separated in 1990. In January 1991 a consent order granted interim custody to the mother with liberal access to the father, and included an order preventing the child's removal from Ontario. In May 1991 the mother sought final custody and leave of the court to remove the child to England. That motion was returnable on June 27, 1991. In her affidavit, the mother stated: " I have no intention of leaving this jurisdiction without an appropriate order of this honourable court." On June 27 the motions judge adjourned the hearing of the substantive issues but ordered that the child "shall not be removed from the jurisdiction in the interim". The hearing was to resume July 2, 1992. On that day, the judge gave directions for the substantive hearing to continue at a later date in a new venue. His order continued the interim custody of the wife and specified the access times of the husband. It did not, however, include a non-removal clause. The next day, the wife left for England with the child.

Sir Stephen Brown P. of the English Court of Appeal held, at p. 149:

In my view this was the plainest example of an unlawful removal. The mother herself appears to have thought so, for she later stated that she regretted having taken that step at that time. It is suggested that she did not appreciate the legal position, although she was in receipt of legal advice at the time. It seems to me that the court itself had a right of custody at this time in the sense that it had the right to determine the child's place of residence, and it was in breach of that right that the mother removed the child from its place of habitual residence.

I am fully in agreement with this statement. It seems to me that when a court has before it the issue of who shall be accorded custody of a child, and awards interim custody to one of the parents in the course of dealing with that issue, it has rights relating to the care and control of the child and, in particular, the right to determine the child's place of residence. It has long been established that a court may be a body or institution capable of caring for the person of a child. As I explained in E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388, the Court of Chancery has long exercised wardship over children in need of protection in the exercise of its parens patriae jurisdiction. But I see no need to rely on jurisdiction emanating from this doctrine, which has understandably "puzzled and concerned" other Contracting Parties; wardship, as we know it, does not apparently exist in Scotland; see Nigel Lowe and Michael Nicholls, "Child Abduction: The Wardship Jurisdiction and the Hague Convention", [1994] Fam. Lau 191, at p. 191.

This Court heard no evidence on the legal effect under Scottish law of the insertion of the non-removal clause in the interim custody order granted to Mrs. T. on November 27, 1992. Therefore we must interpret the clause without aid. from general principles and by analogy to Canadian law. Under Canadian law, a non-removal clause may be placed in an interim order of custody to preserve the court s jurisdiction to make a final determination of custody. It seems to me that when a court is vested with jurisdiction to determine who shall have custody of a child, it is while in the course of exercising that jurisdiction, exercising rights of custody within the broad meaning of the term contemplated by the Convention. In

the words of Article 3(b), "at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention". As noted earlier, the travaux preparatoires envision this situation.

All of this seems particularly appropriate in the case at bar. The non-removal clause here reads simply: "Of new Grants interim interdict quoad crave 2 ad interim against the Defender from removing the said M.T. furth of Scotland" (emphasis in original). Given the underscoring twice of the word 'interim', it seems clear that the non-removal clause was inserted into the custody order of November 27, 1992 to preserve jurisdiction in the Scottish court to decide the issue of custody on its merits in a full hearing at a later date. Thus the Scottish court became "an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention" having custody rights within the meaning of Article 3. The preservation of the access rights of the respondent would be merely a corollary effect of the clause. The appellant's removal of M. therefore constituted a breach of the custody right of the Scottish court within the meaning of Article 3 of the Convention. Article 12 of the Convention, therefore, charges this Court to order his return "forthwith".

It will be observed that I have underlined the purely interim nature of the mother's custody in the present case. I would not wish to be understood as saying the approach should be the same in a situation where a court inserts a non-removal clause in a permanent order of custody. Such a clause raises quite different issues. It is usually intended to ensure permanent access to the non-custodial parent. The right of access is, of course, important but, as we have seen, it was not intended to be given the same level of protection by the Convention as custody. The return of a child in the care of a person having permanent custody will ordinarily be far more disruptive to the child since the child may be removed from its habitual place of residence long after the custody order was made. The situation also has serious implications for the mobility rights of the custodian.

Wrongful Retention

In light of my determination that the removal of M. was wrongful, it is not in strictness necessary to deal with wrongful retention. However, in view of the argument concerning the effect of the February 3, 1993 order of the Scottish court in favour of the father, I think it is important to discuss this issue.

The respondent argued that the appellant's retention of M. after the Scottish court's order of February 3, 1993 was wrongful within the meaning of Article 3 because it was in breach of rights the respondent would have exercised if not for the retention. Neither side placed any evidence before this Court as to the reasons of the Scottish court in granting the order of February 3 which flies in the face of the Solicitor's report indicating that the appellant is the more suitable parent. The lower courts assumed, and the appellant argued, that this custody decision was made solely for the purpose of bolstering the respondent's application under the Hague Convention. This type of order is known internationally as a "chasing order".

Since the Hague Convention's reference to "wrongful retention" is somewhat ambiguous, it must be read in light of the background to the Convention. The drafters of the Convention did not wish to follow the approach of the Council of Europe's Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, Eur. T. S. No. 105, which bases the return of children on the recognition of custody decisions or orders of the requesting state, thus necessitating the requesting state to issue a "chasing order". Anton, supra, explains (at pp. 541-49):

. . . in many abduction cases there will have been no anterior custody decision: the right breached may have been a right conferred by law. The Council of Europe Convention comes into operation only where there is a custody decision to recognise and enforce, and meets the problem presented bv the possible absence of an anterior decision by providing, for the recognition and enforcement under the Convention of a retrospective decision (the so-called "chasing order") relating to the custody of the child and declaring his removal to have beenunlawful. The Special Commission at The Hague, however, considered that it would be wrong to require a person seeking the return of an abducted child to go first to the courts of the State of the habitual residence of the child to obtain a "chasing order" Although, therefore, under Article 15 of the Hague Convention, the courts of a State to which applications for the return of a child have been made may call for a "chasing order", this is merely an option. They are likely to avail themselves of it only when they have substantial doubts which cannot otherwise be resolved.

Article 15, allowing for the requested state to seek a "chasing order" from the requesting state, is as follows:

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

The provision, it will be observed, contemplates that the initiative for obtaining a chasing order is with the requested state and that the order is intended to determine whether the removal or retention was wrongful. In short, for the purposes of the Convention, a "chasing order" serves to clarify for the requested state the opinion of the requesting state that indeed the continuing retention was wrongful.

There is nothing in the Convention requiring the recognition of an ex post facto custody order of foreign jurisdictions. And there are several statements in the supplementary material to support the view that "wrongful retention" under the Hague Convention does not contemplate a retention becoming wrongful only after the issuance of a "chasing order". According to the report of Professor Perez-Vera on the Preliminary draft Convention (Preliminary Document No. 6 "Report of the Special Commission") the situations to which "wrongful retention" under the Hague Convention was intended to refer are quite straightforward and conform to common sense. She states:

As a result, an analytical approach seems to be the most appropriate for getting into the gist of the matter in an area where legal terminology could become either too complex or too simple. As a basis for this approach, we shall consider just two elements which coexist in all the situations we have to face and which, in such a way, may be deemed to constitute the unalterable nucleus of the problem.

[Describing "removal"] In the first place, and in all cases, we have the removal of a child away from the normal social environment in which he lived in the care of a custodian (or institution) who exercised over him a legal right of custody. [Describing "retention"] Naturally, we must assimilate to this situation the case of a refusal to return the child after a sojourn abroad. where the sojourn has been made with the consent of the rightful custodian

of the child's person. In both cases. the outcome is the same: the child has been removed from the social and family background which shaped his life.

Secondly, the person who removed the child . . . hopes to obtain the right of custody, from the authorities of the country where the child has been taken . . . [in order to] legalize the factual situation he has created . . .

(Actes et Docunments, supra, at p . 172.)

To paraphrase, a wrongful retention begins from the moment of the expiration of the period of access, where the original removal was with the consent of the rightful custodian of the child This interpretation is repeated in the "Commentary on the Draft" in the Report of the Special Commission, which states:

In the first place, the reference to wrongfully 'retained' children tends to cover the case of a child who is in a different place from that of his habitual residence, with the consent of the rightful custodian, and who has not been returned by the non-custodian parent.

(Actes et Documents, supra, at p. 187.)

Similarly, the Explanatory Report on the Convention states:

The fixing of the decisive date in cases of wrongful retention should be understood as that on which the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to an extension of the child's stay in a place other than that of its habitual residence.

(Actes et Documents, supra, at pp. 458-59.)

At page 429, it adds: "The Convention . . . places at the head of its objectives the restoration of the status quo . . . ".

Accordingly, I conclude that the order granted by the Scottish court in favour of the father on February 3, 1993, standing alone, would not have been sufficient to ground an application under the Hague Convention, as it could not, in itself, make the retention wrongful.

As noted earlier, I am aware of a number of cases, like the present, where the British authorities appear to have assumed that a "chasing order" issued after the child has been taken out of the jurisdiction can by itself make unlawful what was otherwise not contrary to the Convention; see C. v. S. (Minor: Abduction: Illegitimate Child), [1990] 2 All E.R. 449 (C.A.), aff'd [1990] 2 All E.R. 961 (H.L.); Re B.-M. (Wardship: Jurisdiction), [1993] 1 F.L.R. 979 (H.C. (Fam. Div.)); and Re N. (Child Abduction: Habitual Residence), [1993] 2 F.L.R. 124 (C.A.). In particular, since this case was argued, a number of British and Australian cases have come to my attention where wardship proceedings in England have been used as "chasing orders" after the removal of a child to establish wrongful retention whether by or against the person having the right of custody at the time of the removal; see, for example, Re B.-M., supra; and In the Marriage of W.M. and G.R. Barraclough, [1987] 11 Fam. L.R. 773 (Fam. Ct. Aust.). I refrain from commenting further about these cases, but I simply observe that such an approach taken against a custodial parent (other than one acting on an interim basis, as here) appears at first blush to be directed to protecting interests other than custody rights, to which the remedy of return of the child is confined under the Convention. 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. I observe that in a recent United States

case, the court there refused to honour a request for return under such circumstances; see Meredith v. Meredith, 759 F.Supp. 1432 (D. Ariz. 1991).

Exceptions to the Return of a Wrongfully Removed Child

Having determined that M. was wrongfully removed under the terms of the Convention, Article 12 of the Convention mandates this Court to order his return "forthwith" unless his case fits into one of the exceptions set forth in Articles 12, 13 and 20. These are (see John M. Eekelaar, "International Child Abduction by Parents" (1982), 32 U.T.L.J. 281, at p. 311):

1. More than a year has elapsed between the removal and the commencement of judicial proceedings and it can be demonstrated that the child is now settled into his new environment: Article 12;

2. The person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention: Article 13(a);

3. The person . . . having the care of the person of the child had acquiesced in the removal or retention: Article 13(a);

4. 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: Article 13(b);

5. The child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take into account of its views: Article 13;

6. 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": Article 20.

As well, it will be remembered, there is the exception in s. 5 of the Manitoba Act that if the court is satisfied that a child would suffer serious harm from leaving or placing the child with the person named in an extra provincial order, it must make another custody order.

The only exceptions into which it is claimed M. fits are that of "serious harm" under the Manitoba Act or "a grave risk . . . [of] physical or psychological harm " under the Convention. It is argued that M.'s separation from his mother, who has been his primary caretaker for the past 13 months, will cause such harm, and that such separation is the necessary consequence of an order of return, due to the currency of the Scottish custody order in favour of the father of February 3, 1993. I shall deal with the matter on the basis that both tests of harm are applicable to the present proceedings; I shall have more to say about this later.

As noted by Davidson J., the tests for harm under the Manitoba Act and the Convention are not expressed in the same terms. The former requires that the "child would suffer serious harm if the child remained in or was restored to the custody . . .". The latter requires "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". Twaddle J.A. disposed of the problems raised by this variance by stating. at p. 908: "As 'serious harm' to the little boy in this case would necessarily be preceded by a grave risk of harm to him, it is only necessary to consider the exceptions set out in the Convention." In view of the findings that the facts here did not meet the tests of harm either as expressed in the Convention or the Act. I need not delve into this issue. I content myself by saying that I agree that the inconsistencies between the Convention and the Act are not so great as to mandate the application of a significantly

different test of harm. Because of this and because, as I will explain later, it is in my view the only relevant exception, I will consider only case law under the "harm" exception of the Convention, on which in any case the appellant essentially relied.

It has been generally accepted that the Convention mandates a more stringent test than that advanced by the appellant. In brief, although 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. Examples of cases that have come to this conclusion are: Gsponer v. Johnstone (1988), 12 Fam. L.R. 755 (Fam. Ct. Aust. (Full Ct.)); Re A. (A Minor) (Abduction), [1988] 1 F.L.R. 365 (Eng. C.A.); Re A. and another (Minors) (Abduction: Acquiescence), [1992] 1 All E.R. 929 (C.A.); Re L. (Child Abduction) (Psychological Harm), [1993] 2 F.L.R. 401 (End. H.C. (Fam. Div.)); Re N. (Minors) (Abduction), [1991] 1 F. L. R. 4 1 3 (Eng. H. C . (Fam. Div.)); Director-General of Family and Community Services v. Davis (1990). 14 Fam. L.R. 381 (Fam. Ct. Aust. (Full Ct.)); C. V. C., supra, In Re A. (A Minor) (Abduction), supra, 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 for 'otherwise place the child in an intolerable situation'.

I hasten to add, however, that I do not accept Twaddle J. A.'s assessment that the risk contemplated by the Convention must come from a cause related to the return of the child to the other parent and not merely from the removal of the child from his present caregiver. As this Court stated in Young v. Young, [1993] 4 S.C.R. 3, from a child centred perspective, harm is harm. If the harm were severe enough to meet the stringent test of the Convention, it would be irrelevant from whence it came. I should observe, however, 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. By stating that before one year has elapsed the rule is that the child must be returned forthwith, Article 12 makes it clear that the ordinary effects of settling in, therefore, do not warrant refusal to surrender. Even after the expiration of one year, return must be ordered unless, in the words of the Convention, "it is demonstrated that the child is now settled in its new environment".

In the case at bar, there is no doubt that M. would suffer some psychological harm in being torn from his mother's custody and thrust into that of his father, especially in light of the possibility that, on a re-hearing, the Scottish court may award final custody back to the mother. To paraphrase Helper J.A., it is not good for a child to be bounced from one caregiver to another. This problem has been recognized by other courts. In Re L., supra, the father was American and the mother British. They had lived in Texas where the child was born in 1991. The mother wrongfully removed the child to England. The father applied under the Hague Convention for the return of the child, and the mother resisted the application under the exception in Article 13(b). The mother adduced evidence from two developmental psychologists that to separate a mother from a 19 month old would cause the child grave psychological harm. The court held that this evidence went to the merits of a custody hearing. The court determined that the risk of harm to the child would only arise if the mother refused to accompany the child or was denied a visa to do so. Even so, the court held that the harm was not severe enough to invoke Article 13(b). At page 405, it stated:

Even if she still failed [to accompany the child to Texas or] to obtain a visa, I do not accept that there is a grave risk that Thomas would be exposed to psychological harm of the necessary degree, or be placed in an intolerable situation of the necessary degree. After all, he will be collected by his father here, and taken to Texas, and then will be cared for by his father and by his paternal grandmother thereafter.

In light of the undertakings of the father in Re L. to pay the mother's airfare, to pay interim support money. and to vacate the matrimonial home in Texas for her to stay there with the child until the custody hearing the court was satisfied that the child s interests were safeguarded while the Convention was honoured.

Remedies

As discussed earlier, the "chasing order" issued by the Scottish court complicates matters in the case at bar, for it makes one objective of the Convention, a return to the status quo as it existed before the wrongful removal, impossible to achieve without taking additional action. The Convention does not provide specifically for remedial flexibility because it is based on the primary assumption that the wrongful removal of a child necessarily has harmful effects (see the preamble; see also Anton, supra, at p. 543). In interpreting the Convention, courts have recognized that frequently an unqualified return order can be detrimental to the short term interests of the child in that it wrenches the child from its de facto primary caregiver. As Helper J.A. put it, at p. 215, "children must not be made to suffer twice over as a result of their parents' wrongdoing". The younger the child, the greater the need for the courts' concern. This is especially so in fact patterns like the present to which the travaux preparatoires refer to as "in effect, the reverse of the usual child abduction case" (Dyer Report, Actes et Documents, supra, p. 40).

Given the preamble's statement that "the interests of children are paramount", courts of other jurisdictions have deemed themselves entitled to require undertakings of the requesting party provided that such undertakings are made within the spirit of the Convention: see Re L., supra; C. v. C., supra; P. vs P. (Minors) (Child Abduction), [1992] 1 F.L.R. 155 (Eng. H.C. (Fam. Div.)); and Re A. (A Minor) (Abduction), supra. Through the use of undertakings, the requirement in Article 12 of the Convention that "the authority concerned shall order the return of the child forthwith" can be complied with, the wrongful actions of the removing party are not condoned, the long-term best interests of the child are left for a determination by the court of the child's habitual residence, and any short-term harm to the child is ameliorated.

Mr. T. has offered the following undertakings through his solicitors which this Court has accepted:

(a) He will not take physical custody of M. upon M.'s return to Scotland and not until a Court permits such custody.

(b)That he will commence such proceedings as will enable the Court of competent jurisdiction in Scotland to determine within approximately 5 weeks of M.'s return on an interim or final basis, the issue of M.'s care and control.

Interaction Between Convention and Manitoba Act

Davidson J. made a four-month interim custody order in favour of the appellant. The interveners before this Court disagreed on whether the Manitoba Court of Queen's Bench had jurisdiction to grant such an order. This difference of opinion arises from the interpretation of s. 6 of the Manitoba Act (which allows such interim orders as are in the

best interests of the child) and the interpretation of Articles 19 of the Convention (which demands that a wrongfully removed child must be returned "forthwith") and 16 (which states that a court charged with determining a case by application of the Convention "shall not decide on the merits of rights of custody" unless it has first determined that the child is not to be returned under the Convention). The Attorney General of Canada submits that, if a conflict exists between these provisions, the Convention must prevail. The Attorney General of Manitoba submits that in such a case, the Manitoba legislation must prevail.

Professor Vaughan Black in his article "Statutory Confusion in International Child Custody Disputes" (1993), 9 C.F.L.Q. 279, at pp. 279-80, describes the problem created by the provincial enactments of the Convention:

The problem arises because in some cases two distinct statutory regimes present themselves as applicable. In the mid-1980s, all Canadian provinces and territories adopted legislation implementing the Hague Convention on the Civil Aspects of International Child Abduction. This legislation was enacted on top of existing statutes dealing with matters of child custody. Those existing statutes typically had some provisions dealing with questions of territorial complexity. Specifically, the existing statutes contained provisions dealing with the questions of when the provinces' courts could and should take jurisdiction over a geographically complex custody case, and the related matter of the circumstances in which foreign custody orders should be accorded recognition. In some provinces, . . . the Hague Convention is found in the same statute as the general custody provisions. In others, the Convention was enacted in a separate statute confined to the promulgation of that treaty. In either event - at least in those cases where the foreign country in question is a contracting state under the Convention - international custody cases appear to present the problem of two applicable statutes.

The preliminary draft Convention that had been completed by the Hague Conference Special Commission in November 1979 was submitted to the Uniform Law Conference of Canada in August 1980 by its Committee on International Conventions on Private International Law (see K. B. Farquhar, "The Hague Convention on International Child Abduction Comes to Canada" (1983), 4 Can J. Fang L. S). The Uniform Law Conference agreed upon the text of a "Uniform Act" to implement the Hague Convention. Four provinces (New Brunswick, Nova Scotia, Saskatchewan and Alberta) enacted legislation that paralleled the Uniform Act, including its provision that, in the event of a conflict between the Convention and any other enactment, the Convention prevailed: International Child Abduction Act, S.N.B. 1982, c. I-12.1; Child Abduction Act, S.N.S. 1982, c. 4; International Child Abduction Act, S.S. 1986, c. I-10.1; and International Child Abduction Act, S.A. 1986, c. I-6.5.

Quebec chose not to enact the Convention at all, but to legislate equivalent provisions: An Act respecting the civil aspects of international and interprovincial child abduction, S.Q. 1984, c. 12. The five remaining provinces (Manitoba, Ontario. British Columbia, Prince Edward Island and Newfoundland) adopted the Convention in a more general statute dealing with the civil aspects of child abduction: Child Custody Enforcement Act, S.M. 1982, c. 27 (now R.S.M. 1987, c. C360); Children's Law Reform Amendment Act, 1982, S.O. 1982, c. 20; Family Relations Amendment Act, 1982, S.B.C. 1982, c. 8, as am. by S.B.C. 198:, c. 72, s. 20; Custody Jurisdiction and Enforcement Act, S.P.E.I. 1984, c. 17: and The Children's Law Act, S.N. 1988, c. 61. Of these five, Ontario, Prince Edward Island and Newfoundland's enactments all contain the provision that, in the event of a conflict between the Convention and any other legislative scheme, the Convention prevails. Only the British Columbia and Manitoba Acts do not contain such supremacy provisions.

Black (supra at p. 286) asserts that the difference of view between the provinces that enacted the Convention simpliciter and those that grafted it onto a more expansive legislative scheme stem from the fact that:

A province might wish to enact legislation which imposes an obligation to order the return of abducted children which is "stricter" - that is, subject to narrower exceptions - than the obligation imposed by the Convention. Parties seeking an order for return pursuant to such laws should not then be faced with an argument that one of the exceptions in the Convention operates to preclude that relief. In other words, the Convention enacts minimal obligations to order the return of abducted children, and does not operate to preclude the enactment of more stringent obligations. [Emphasis in original.]

However, the situation described by Black, where a province might hypothetically wish to enact provisions narrower than those of the Convention, is the reverse situation to that of the case at bar. It was argued before us that, because the two pieces of legislation were not pleaded as alternatives, and because Manitoba has enacted enforcement provisions looser than those of the Convention, the Manitoba Court of Queen's Bench has jurisdiction to make an interim custody order that is in contravention of the requirements of Articles 12 and 16 of the Convention.

It is, in strictness, not necessary to decide whether the provisions of the Child Custody Enforcement Act conflict with the provisions of the Convention in the case at bar. The four months of interim custody granted to the appellant by Davidson J. have expired, as have the two months Helper J.A. would have granted. Although this case has been expedited, the appellant has had de facto custody of M. in Canada for 13 months. The respondent has undertaken not to enforce any right to custody he might have under Scottish law until a full hearing of the matter if the appellant accompanies the child back to Scotland. Whether she accompanies M. or not, the appellant must return the child to Scotland "forthwith".

I think it advisable, however, to set forth my views on the interrelationship of the Convention and the other provisions of the Act in circumstances such as arose here. As I see it, those provisions and the Convention operate independently of one another. This result appears obvious when an application is made solely under the Convention or solely under the Act. One procedure may provide advantages that the other does not. When a particular procedure is chosen, however, it should operate independently of the other, though where the provisions of the Act are selected it may not be improper to look at the Convention in determining the attitude that should be taken by the courts, since the legislature's adoption of the Convention is indicative of the legislature's judgment that international child custody disputes are best resolved by returning the child to its habitual place of residence; see G v. G (Minors) (Abduction), [1991] Fam. Law 519 (C. A.), at p. 519; and Black, supra, at pp. 290-91.

In the present case, applications were made under both the provisions of the Act and the Convention, and the courts below attempted to deal with both at the same time. Such mixing of independently devised comprehensive procedures is seldom helpful, and what is more important I do not think it is called for by the Act. It is true that unlike the Uniform Act, the Manitoba Act does not expressly provide that in the event of conflict the Convention prevails, but I do not think this is necessary where an application is made under the Convention. There is nothing in the Act indicating that when an application is made under the Convention, the independent procedure provided by the Act (which, unlike the Convention, is more narrowly directed at the enforcement of custody orders) should be referred to. By adopting the Convention, then, the legislature must be taken to do what it requires: promptly return a child wrongfully removed from its state of habitual residence to

that state. Unless the applicant chooses to abandon it, the application under the Convention applies. Black, supra, at pp. 281-82, thus puts the matter:

The Convention simply requires that, subject to a narrow list of exceptions, children wrongfully removed from the country of their habitual residence be promptly returned to that state. The courts in the contracting state where the "abducted" children are present have an obligation to order such return. Article 16 of the Convention makes it clear that where there is an application for the return of a child, such application takes precedence over any custody application:

After receiving notice of a wrongful removal or retention of a child .... the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention . . .

Thus, an application for return pursuant to the Convention preempts a local custody application. Only if the application for return is refused - either because the Convention is held to be inapplicable or because one of its narrow exceptions is found to operate - should a custody application proceed. Since the court which decided to grant an order for return of the children pursuant to the Convention would obviously not both order such return and then proceed to determine custody, a successful application under the Convention entails declining any custody jurisdiction the court might otherwise possess. [Emphasis in original.]

Thus, as I see it, Davidson J. or Helper J.A. could not make an interim custody order under s. 6 of the Act. I am not, however, prepared to completely discount the possibility that the end sought by Helper J.A. could not be achieved under the Convention. Ordinarily, it is neither necessary nor desirable to proceed otherwise than with the utmost expedition. That is because in most cases (as the situations described in the Dyer Report, supra, illustrate), the child will be returned to its custodian-its ordinary caregiver. And, in cases of interim custody, the interim custodian will normally accompany the child back. As Helper J.A. pointed out, what makes this case difficult is that the "chasing order" makes the intended operation of the Convention impossible.

Because of the "chasing order" obtained by the applicant, the restoration of the status quo, which in the words of the Explanatory Report, supra, at p. 429, "The Convention . . . places at the head of its objectives" cannot be achieved. Faced with this situation, 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. Here this Court accepted undertakings made by the applicant which in the circumstances before it appeared best calculated to achieve that end. However, such undertakings may not always be forthcoming or for one reason or another this course may not be acceptable. That is why I would not rule out the possibility that, in circumstances such as these, the time frame for return proposed by Helper J.A. might be justified under the Convention. I observe that Article 11 contemplates a period of six weeks when the authorities in the requesting state may enquire about delay.

Disposition

At the conclusion of the oral argument, judgment was delivered as follows:

The appeal is dismissed on the undertaking made to the Court by respondent through his counsel. Counsel will deposit with the Registrar no later than tomorrow at noon a signed undertaking in the terms before the Court. Madame Justice L'Heureux-Dube would have agreed with Madame Justice Helper's disposition of the case in reference to the undertaking.

Reasons and determination as to costs to follow.

In light of all the circumstances, there will be no order as to costs.

The reasons of L'Heureux-Dube and McLachlin JJ. were delivered by L'Heureux-Dube J.

As my colleague La Forest J. has pointed out, this appeal concerns the problem of international abduction of children in violation of the Convention on the Civil Aspects of International Child Abduction, Can. T.S. 1983 No. 35 ("Convention"), which, in the province of Manitoba. is implemented through the Child Custody Enforcement Act, R.S.M. 1987, c. C360 ("CCEA").

Here, the appellant mother, who was granted interim custody of her eight-month-old son M. from the courts in Scotland on November 27, 1992, flew to Canada with her son on December 2, 1992 in breach of the court order which restricted her from leaving Scotland. The respondent father is now seeking his son's return to Scotland. He relies upon the Convention and upon an ex parte final custody order granted to him by the Scottish courts after his wife and son had left Scotland. The question before this Court is whether the Convention applies to the facts of this case and, if so, whether transitory measures for the return of the child to his habitual place of residence are within the jurisdiction of the courts in Manitoba pursuant to the CCEA.

As appears from the judgment rendered orally from the bench on January 26. 1994, we are all in agreement that this appeal should be dismissed and that the Convention is applicable to the circumstances of this case. In this respect, I wish to stress that I am in full agreement with my colleague La Forest J.'s interpretation of the Convention as well as the application of the Convention to the present set of circumstances. Specifically, I agree with his interpretation of the terms "wrongful removal" and "wrongful retention" in the Convention and his interpretation of the Article 1 3(b) exemption under the Convention. Furthermore, I stress my agreement with his comments at pp. 589 - 590 concerning the mobility rights of women. I agree that the insertion of a non-removal clause in a permanent order of custody does not result in a right of custody being retained by the court and therefore does not result in a wrongful removal, as defined in the Convention, in circumstances where the custodial parent moves with the child to a new jurisdiction.

While I concur with my colleague's interpretation and application of the Convention to the present set of circumstances, I nonetheless express some reservations as regards his view of the jurisdiction of the Manitoba courts to impose transitory measures pursuant to the CCEA for the return of the child to his habitual place of residence. I believe that the Manitoba courts have jurisdiction to make such transitory orders where they are necessary to protect the best interests of the child, provided, of course, that the purpose and terms of these orders do not hamper the objectives of the Convention and that the return of the child to the proper jurisdiction not be delayed to the point of frustrating the purpose of the convention. In the circumstances of this case, Helper J.A. of the Manitoba Court of Appeal was, in my view, justified in adopting the following transitory order in her dissenting judgment:

1. interim custody of the child M. is granted to Mrs. T.; 2. Mr. T.'s application to return M. to Scotland is staved on the understanding that his application mav be brought forward upon evidence that he consents to an order in Scotland allow ing Mrs. T. interim custody; and 3. Mrs. T. is directed to commence her application for custody in Scotland within two months of this order and to proceed as expeditiously as possible.

((1993). 88 Man. R. (2d) 204, at p. 218.)

Helper J.A. adopted this order so as to protect the best interests of the child (M.), a concern which, as I will explain later, is central to both the Convention and the CCEA. She found that such an order was necessary because of the "chasing order" issued by the Scottish courts on February 3, 1993, after the appellant and M. had left Scotland. This "chasing order" provided the respondent with final custody of M. However, it was granted ex parte and it appears that in granting it the court did not consider the merits of the custody issue and in particular the best interests of the child. Helper J.A., commenting on this "chasing order" and the effect it could have upon M.'s return under the Convention, observed (at p. 217):

The effect of the June 28, 1993 order mill be M.'s removal from his mother's care immediately upon his return to Scotland. He will be placed with his father whom he has not seen since November 1992 and will be cared for by his paternal grandparents, now strangers to him. Two different courts have determined that Mrs. T. can best meet M.'s needs. The very real possibility exists that following a full custody hearing, the Scottish court will again return M. to his mother's care, this time in the long term. He will again be forced to experience change. I am strongly of the view that the possibility of such a result ought to be avoided.

Faced with this situation. Helper J.A. adopted the transitory order described above so as to protect M.'s best interests. which after all, are of paramount importance according both to the preamble of the Convention and the Manitoba CCEA .

My colleague La Forest J. also acknowledges the difficult situation created by the "chasing order", which, as he noted, was issued to bolster the respondent's application under the Convention. To overcome this difficulty and to protect M.'s best interests, my colleague found it sufficient to rely on undertakings from the respondent father to the effect that M. would remain in his mother's custody upon his return to Scotland. Commenting on the use of such undertakings, La Forest J. stated (at p. 599):

Through the use of undertakings, the requirement in Article 12 of the Convention that "the authority concerned shall order the return of the child forthwith" can be complied uith... and any short-term harm to the child is ameliorated.

However, while La Forest J. found that undertakings from the father were sufficient in this case to protect M.'s best interests, he noted that there might be some instances where undertakings are incapable of doing so and that in such circumstances he would not rule out the possibility that "the time frame for return proposed by Helper J.A. might be justified under the Convention". (p. 605)

I, however, would go further than my colleague. Rather than merely leaving open the possibility that transitory measures may sometimes be justified under the Convention. I believe that the Manitoba courts do have jurisdiction to impose transitory measures under s. 6 CCEA in circumstances where such measures are necessary to protect the best interests of the child, do not depart from the spirit and purpose of the Convention. and do not overly delay the return of the child to the proper jurisdiction.

The facts of this case present a situation where, given the "chasing order" and the absence of undertakings by the father at the time of the previous hearings, transitory measures mere appropriate. Specifically, in the circumstances of this case, the transitory order proposed by Helper J.A. of the Manitoba Court of Appeal was appropriate. However in saving this I want to make it clear that the delay in the return of M. under such a transitory order should be as short as possible. In the circumstances of this case, I believe M.'s return has already

been sufficiently delayed. Consequently, I agree with the majority that M. should now be returned immediately.

Finally, I do not share my colleague's view that transitory measures become unnecessary in the face of undertakings such as those offered in this case by Mr. T. through his solicitors. These undertakings, which my colleague has reproduced in his reasons, do not, in my view, preclude the Manitoba courts from imposing transitory measures where necessary when applying the Convention.

Given these premises, a discussion of the interplay between the CCEA and the Convention seems essential and will be at the forefront of my analysis.

The Implementation of the Convention

As my colleague has pointed out, the necessity of international agreements with regard to the abduction of children has been abundantly demonstrated particularly in recent years. The increase in rapid international transportation the freer crossing of international boundaries, the continued decrease in documentation requirements when entering foreign jurisdictions, the increase in "international families", where parents are of different countries of origin, and the escalation of family break-ups world wide, all serve to multiply the number of international abductions. (Hague Conference on Private International Law, Actes et documents de la Quatorzieme session, t. III, Child Abduction (1982), Preliminary Document No. I "Questionnaire and Report on international child abduction by one parent", at pp. 18-19.) In turn, the effects of abduction are as numerous and varied as the causes. In the end, abduction may thwart a hearing of the custodial determination on the merits, children may suffer severe emotional consequences from the traumatic event of being whisked away to an unfamiliar location far from their usual circumstances and, further, if the international community does not act quickly and in a uniform manner, children may never be returned to their country of origin and their custodial parent.

It is with this concern in mind that, in 1976, Canada suggested at the Hague Conference on Private International Law that a solution to these problems be explored. Four years later, on October 25, 1980, the Hague Convention on the Civil Aspects of International Child Abduction was signed.

Federal treaty-making power is found in s. 132 of the Constitution Act, 1867 which provides that:

132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries, arising under treaties between the Empire and such Foreign Countries.

Although this provision makes it clear that the treaty-making power lies within federal jurisdiction it has. nevertheless, been suggested that a concurrent provincial jurisdiction for treaty-making may exist for matters within provincial control. According to Professor Hogg in Constitutional Law of Canada (3rd ed. 1992) at p. 283, however:

. . . it suffices to say that the provincial claim has never been accepted by the federal government, and the federal government does in fact exercise exclusive treaty-making powers.

Regardless of this exclusive jurisdiction, federal treaty-making power is, nonetheless, limited by the constitutional division of powers. As has long been set out in the Labour Conventions

Case (Attorney-General for Canada v. Attorney- General for Ontario. [1937] A.C. 326 (P.C.), at p. 348):

But in a State where the Legislature does not possess absolute authority, in a federal State where legislative authority is limited by a constitutional document, or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the executive have the task of obtaining the legislative assent not of one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation.

This complication is particularly apposite to the situation at hand and is expanded upon by Professor Hogg. supra. in the following passage at p. 294:

... the federal government cannot ensure the performance of treaties which require legislation within the legislative competence of the provinces.

This does not mean that Canada is always precluded from signing, ratifying or performing treaties upon subjects within the legislative competence of the provinces. The federal government can consult with the provinces before assuming treaty obligations which would require provincial implementation, and if all provinces (or all affected provinces) agree to implement a particular treaty, then Canada can adhere to the treaty without reservation.

Thus, in light of the above, although the federal government had the necessary jurisdiction to sign the Convention, it remains within the jurisdiction of the individual provinces to implement the Convention. As my colleague has pointed out, New Brunswick, Nova Scotia, Saskatchewan and Alberta implemented the Convention by enacting legislation in line with the Uniform Act, a text agreed upon to implement the Convention in a uniform manner and which includes a provision that, in the event of conflict between the Convention and any other enactment, the Convention is to prevail (International Child Abduction Act, S.N.B. 1982, c. I-12.1; Child Abduction Act, S.N.S. 1982, c. 4; International Child Abduction Act, S.S. 1986. c. I-10.1; and International Child Abduction Act, S.A. 1986, c. I-6.5). Approaching the matter somewhat differently, Quebec did not enact the Convention but, rather implemented An Act respecting the civil aspects of international and interprolincial child abduction, S.Q. 1984, c. 12, which encompassed equivalent provisions. Finally, Manitoba, Ontario, British Columbia, Prince Edward Island and Newfoundland enacted the Convention through a more expansive provincial legislative scheme concerning civil aspects of child abduction (The Child Custody Enforcement Act, S.M. 1982, c. 27 (now R.S.M. 1987, c. C360); Children's Law Reform Amendment Act, 1982, S.O. 1982, c. 20; Family Relations Amendment Act, S.B.C. 1982, c. 8, as am. by S.B.C. 1985, c. 72, s. 20; Custody Jurisdiction and Enforcement Act, S.P.E.I. 1984, c. 17; and The Children's Law Act, S.N. 1988 c. 61). The Ontario, Prince Edward Island and Newfoundland Acts include provisions that provide that the Convention is to prevail in the event of a conflict between it and any other enactment. No such provision is included in the British Columbia and Manitoba Acts.

The potential for conflict arising out of the provincial implementation of federally negotiated treaties is a real possibility and has been discussed by Professor Vaughan Blact: in his article "Statutory Confusion in International Child Custody Disputes" (1993), 9 C.F.L.Q. 279, at pp. 279-80, particularly with respect to the Convention:

The problem arises because in some cases two distinct statutory regimes present themselves as applicable. In the mid-1980s, all Canadian provinces and territories adopted legislation implementing the Hague Convention on the Civil Aspects of International Child Abduction. This legislation was enacted on top of existing statutes dealing with matters of child custody.

Those existing statutes typically had some provisions dealing with questions of territorial complexity. Specifically, the existing statutes contained provisions dealing with the questions of when the provinces' courts could and should take jurisdiction over a geographically complex custody case, and the related matter of the circumstances in which foreign custody orders should be accorded recognition. In some provinces... the Hague Convention is found in the same statute as the general custody provisions. In others. the Convention was enacted in a separate statute confined to the promulgation of that treaty. In either event -- at least in those cases where the foreign country in question is a contracting state under the Convention -- international custody cases appear to present the problem of two applicable statutes.

Accordingly, I now turn to an examination of the interplay between the Convention and the CCEA, a matter on which I reach a somewhat different conclusion than my colleague La Forest J.

Interplay between the Convention and the CCEA

This case raises the question of whether or not s. 6 CCEA provides the Manitoba courts with jurisdiction to make transitory orders in light of the best interests of the child when applying the Convention. Section 6 CCEA reads:

6. Upon application, a court,

(a) that is satisfied that a child had been wrongfully removed to or is being wrongfully retained in Manitoba; or

(b) that may not exercise jurisdiction under section 4, may do any one or more of the following:

(c) Make such interim custody order as the court considers is in the best interests of the child.

(d) Stay the application subject to,

(i) the condition that a party to the application promptly commence or proceed expeditiously with a similar proceeding before an extra-provincial tribunal, or

(ii) such other conditions as the court considers appropriate.

(e) Order a party to return the child to such place as the court considers appropriate and, in the discretion of the court, order pas ment of the cost of the reasonable travel and other expenses of the child and and parties to or witnesses at the hearing of the application. [Emphasis added.]

Articles 11 and 12 of the Convention read:

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings. the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall

transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the time of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child. [Emphasis added.]

It is pursuant to s. 6(c) CCEA that Davidson J. of the Manitoba Court of Queen's Bench made a four month interim custody order in favour of the appellant mother while, at the same time, ordering that the child be immediately returned to Scotland pursuant to the Convention.

On appeal, the Manitoba Court of Appeal did not dispute the court's jurisdiction to make a transitory order under s. 6 CCEA when considering an application for return under the Convention. It did, however, question whether one would be appropriate in the case at hand. Twaddle J.A., writing for the majority of the Court of Appeal, held that s. 6 CCEA did not provide the court with a multitude of options but, rather, simply enabled the court to delay the return of the child until after a final determination of custody is made in circumstances where "the return of the child might be both unnecessary and unduly harmful to the child" (p. 211). Twaddle J.A. was not convinced, however, that there was a "sufficient likelihood of the Scottish court making a final decision without the boy's return as would justify a deferral of it" (p. 212). Consequently, he ordered that the child be returned to Scotland forthwith. With regard to the order of interim custody, he was of the view that such an order contradicted the goal of return "forthwith" and, thus, had the same effect as the stay and was therefore unjustified. He stated that where "an order [for interim custody] accompanies another [order] for the child's immediate return, it should not extend beyond the time reasonably required to arrange the return" (p. 212). Furthermore, he added that it should not "be worded in such a way as to suggest that it is intended to have continued effect after the child's return return to the foreign jurisdiction" (p. 212).

Helper J.A., differed from the majority, not so much with regard to the principles in determining the interrelation between the CCEA and the Convention, but rather, as to their application. She concluded that the court could and should temporarily stay the respondent's application for the return of the child to Scotland, pending the appellant's application for custody of the child in Scotland. In her view, the court was entitled to consider the best interests of the child and was empowered to make an interim order. She stated (at p. 215):

In giving effect to extra-provincial custody orders, courts must recognize that a possible by-product of the black letter application of the Act and the Convention is undue stress and, in some cases, actual trauma suffered by young children who have no voice in the courtroom.

The corollary to the direction in the Convention that the signatories wish to protect children from the harmful effects of their wrongful removal or retention is the reality that children must also be protected from harmful changes that are incomprehensible to them.

With regard to the interrelation between the Convention and the CCEA, she held (at p. 217):

The Convention and the Act must be read together. Each case must be decided on its own facts. The courts are charged with the grave responsibility of protecting young children when determining the appropriate remedy for applicants under the Act and the Convention.

She concluded that Davidson J. overlooked M.'s short-term interests in ordering his immediate return to Scotland. She believed that the Scottish custody order would override Davidson J.'s interim order and that as a result M. would be removed from his mother's care and custody and placed in that of his father. In her view, the best method of protecting M.'s best interests would be to stay the respondent's application for return until such time as custody proceedings had been disposed of on the merits in Scotland. In the alternative, she expressed a willingness to permit the application for return to be brought forward if the respondent consented to the appellant having interim custody in Scotland.

As is apparent from this brief overview of the judgments below, an examination of the interaction and the potential conflict between the CCEA and the Convention is crucial to the determination of the questions in this appeal.

In response to this issue, two divergent approaches are taken by the Attorney General of Canada and the Attorney General for the province of Manitoba. On the one hand, the Attorney General of Manitoba submits that the Convention is implemented through the CCEA and must be interpreted in light of the statutory language of the CCEA. Such an interpretation should, where possible, avoid any conflict between the Convention and the CCEA. However, if a conflict is unavoidable, the CCEA should prevail. As a result, the Attorney General of Manitoba submits that s. 6 CCEA applies to applications, in Manitoba, under the Convention.

The Attorney General of Canada, on the other hand, submits that the CCEA and the Convention establish two independent schemes for the enforcement of foreign custody orders. Thus, to the extent that the claim falls under the Convention, interim orders could not be made under s. 6 CCEA.

My colleague La Forest J. appears to adopt the submissions of the Attorney General of Canada. At page 603 he states:

I think it advisable, however, to set forth my views on the interrelationship of the Convention and the other provisions of the Act in circumstances such as arose here. As I see it, those provisions and the Convention operate independently of one another. This result appears obvious when an application is made solely under the Convention or solely under the Act. One procedure may provide advantages that the other does not. When a particular procedure is chosen, however, it should operate independently of the other . . .

With respect, I cannot agree. In my opinion, the CCEA and the Convention do not establish two independent regimes. Instead, since the Convention is implemented in Manitoba by means of the CCEA, the two must be read in concert. Of course, in doing so courts should attempt to arrive at an interpretation that. to the extent possible, gives full effect to the purpose of the Convention. This interpretive guideline has been described by P.-A. Cote in The Interpretation of Legislation in Canada (2nd ed. 1991), at p. 308, as follows:

According to the Canadian constitutional system, both the federal Parliament and the provincial legislatures may enact statutes that contradict the country s international obligations. A statute is not void or inoperative simply because it violates international custom or convention. There is a presumption, however. that the legislature does not intend such a result. Given two possible interpretations, the one respecting a state's international obligations is to be favoured. [Emphasis added.]

The Provisions of the CCEA and the Convention

A review of the preamble of the Convention makes it clear that the best interests of the child are a paramount consideration:

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions: [Emphasis added.]

While, as my colleague notes, the preamble refers to the best interests of children generally, and not to the best interests of any particular child, I cannot believe that the intention was to ignore the best interests of individual children.

Regardless, what is clear is that the Convention intends to protect the best interests of children by providing for their prompt return if they are taken from their state of residence in breach of custody rights. To this end, the Convention precludes an investigation by the haven state into the merits of the claim as to rights of custody. A. E. Anton, the Chair of the Commission which drafted the Convention. in "The Hague Convention on International Child Abduction" (1981), 30 Int'l & Comp. L.Q. 537, at p. 543, comments on the drafters' intent:

The Commission started from the assumption that the abduction of a child will generally be prejudicial to its welfare. It followed that, when a child has been abducted from one country to another, international mechanisms should be available to secure its return either voluntarily or through court proceedings.

As I already noted, in my opinion the Convention and the CCEA through which it is implemented in Manitoba must be read in concert, each informing the interpretation of the other. In Manitoba, the two do not establish independent regimes. This interpretive approach is simplified by the fact that both are premised on the best interests of the child. The CCEA simply expands upon the Convention by providing an additional mechanism to act in accordance with the best interests of the child. This mechanism does not conflict with the provision of prompt return under the Convention. It cannot be contrary to the objectives of the Convention to provide transitory measures in order to protect the child from the harmful effects of separation from the removing parent. Both returning the child and providing for transitory measures act to further the child's best interests. This is particularly apposite in situations such as this one where it is the parent who has custody of the child, here a very young child, who removes the child from the jurisdiction.

In addition, as the Attorney General of Manitoba suggests, this expansion of the transitory role of courts, pursuant to the CCEA, when enforcing the Convention, was clearly in accordance with the framers' intent. For, while some provinces chose simply to implement the Convention, Manitoba chose to expand upon its provisions, or, to use the language of my colleague, to provide "enforcement provisions looser than those of the Convention" (emphasis in original). This intention is clear from the comments of then Attorney General Roland Penner in response to questions with regard to the interrelation between the CCEA and the Convention:

With respect to the point made about conflict between the Act and the Convention, it is my impression -- I'll put this as a question -- is it not the case, in both of the examples used by you, Mr. Riley, that in fact the bill that we're proposing gives greater protection and that the Convention is a minimum? What we're doing is going beyond the Convention in both those instances.

I don't think that there is that potential for conflict. It is always possible of course that there is some conflict that may be perceived between one section of an Act and another, but then that falls to be decided by the ordinary rules of statutory interpretation. However, we'll monitor the situation. It was the intention of this bill not to restrict, but to enlarge the protective mechanisms of the Convention and I think substantially that will happen. [Emphasis added.]

(Legislative Assembly of Manitoba. Standing Committee on Law Amendments, vo. XXX No. 6, June 28, 1982, at p. 101.)

Both the wording of the Convention and the CCEA provide support for the complementary interpretation of the two. First, the precise wording of s. 6 CCEA adopts the same terminology as that of the Convention by making reference to the wrongful removal and retention of the child, thus stressing the fact that the court's jurisdiction to make transitory orders pursuant to s. 6 is to be available regardless of whether the Convention is applicable.

In addition, the wording of the Convention itself provides support for the complementary interpretation of the CCEA and the Convention and for the conclusion that there is no conflict between the two. Article 12 of the Convention buttresses this dialectic and flexible approach in so far as it provides that, when a child has been in the haven jurisdiction for over a year and has settled into the new environment, it may not be in the child's best interest to be returned to the state of origin. given the time elapsed since the abduction. This exception brings into focus the fact that the aim of the Convention is the protection of the interests of children and is particularly important given that this accommodating measure is found within the same section which emphasizes return "forthwith".

Article 12 recognizes that the interests of children may differ from case to case and is therefore consistent with an interpretation of the interplay between the Convention and the CCEA which acknowledges that, in some situations, immediate return without transitory measures will not be in the best interests of the child. 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 CCEA through which the Convention was enacted in Manitoba. and should not mean return without regard for the immediate needs or circumstances of the child. Although, no doubt, the quick return of a child wrongly removed is critical, a slight delay occasioned by a transitory order made in the best interests of the child can be justifiable under the Convention if the circumstances of the case so indicate.

As well, Article 11 of the Convention, which states that an explanation may be requested for a delay of over six weeks in the return of the child, is consistent with my interpretation of the interplay between the CCEA and the Convention in that it supports the view that the return of the child cannot be expected to be immediate but only that it must be timely and proceed as quickly as practical.

Having examined the interrelationship between the CCEA and the Convention, I find it impossible to agree with my colleague La Forest J. that the CCEA and the Convention establish two separate regimes and the jurisdiction of the court hearing an application under the Convention is limited to the considerations set out in the Convention and, therefore that, if the Convention applies, the court may not look to the CCEA to make orders in addition to those provided for by the Convention. It is, simply, not in line with the purpose of the Convention to suggest that, once a determination has been made with regard to the fact that a child has been wrongfully removed, Article 12 of the Convention requires that the child be returned "forthwith", without any consideration of other remedies, such as those under s. 6 CCEA. Neither is Article 16, which states that a court should not decide on the merits of the rights of custody, violated in any way by a transitory order of stay or of interim custody granted in the best interests of the child, provided of course, as is the case here, that the purpose of the transitory order not be to hamper the objectives of the Convention and that the return of the child in the proper jurisdiction not be delayed to the point of frustrating the purpose of the Convention.

The CCEA provides an avenue for the implementation of transitory processes in the best interests of a child to resolve difficulties which the Convention itself appears to foresee. In most cases, the best interests of the child will be served by a quick and expedited return of the child to the country of origin in the aim of decreasing the traumatic nature of the wrongful removal. Nonetheless, there may be circumstances in which immediate return is no longer in the child's absolute best interest. Section 6 CCEA provides a mechanism for addressing this problem. In my opinion, there is no conflict beta een the Convention and the CCEA and the two documents can act together in a harmonious interplay. The extra remedies provided for in the CCEA, to the extent that the remedies are consistent with the objectives of the Convention, are equally available to a court which has decided to return the child but wishes to shield the child in his or her best interests, in so far as is possible, from the immediate negative effects of separation from the removing parent. Recognizing the interactive relationship between the CCEA and the Convention enables courts to achieve the objectives of the Convention with regard to the importance of return and, at the same time, to consider the best interests of the child. Section 6 CCEA enables the Manitoba courts to enforce the Convention in a manner which is in the best interests of the child and which recognizes the human consequences of a return order under the Convention and, in turn, which attempts to facilitate the process for the child. In this regard, I very much agree with Helper J.A.'s statement at p. 215 that:

In giving effect to extra-provincial custody orders, courts must recognize that a possible by-product of the black letter application of the Act and the Contention is undue stress and, in some cases, actual trauma suffered by young children who have no voice in the courtroom.

Clearly, this focus should not be lost in the application of the Convention.

Turning now to the case at hand, I note that we are dealing with a very young child who has been in Manitoba, separated from his father, since December 2, 1992. Clearly, this case presents a situation where transitory measures such as those proposed by Helper J.A. were appropriate in order to buffer the child's return and protect his best interests. However, such transitory measures must be implemented in a manner consistent with the purpose of

the Convention. As a result, their duration should be as short as possible. Consequently, while I believe that at the time it was appropriate for Helper J.A. to adopt the transitory order she did, I do not believe such an order would be appropriate at this time because I would not wish to further delay the return of the child. Thus, I, like the majority, dismiss the appeal, but note that at the time and in the circumstances, the order proposed by Helper J.A. was appropriate.

Returning for a moment to the question of the appropriate duration of transitory orders, I wish to briefly comment on the transitory order first proposed by Davidson J. The Court of Appeal judgments of both Twaddle and Helper JJ.A. expressed certain reservations with this transitory order. I agree with many of these comments. In addition, I feel that it is important to stress that the four month duration of Davidson J.'s transitory order was, in my opinion, excessive in light of the Convention.

Undertakings

The final point that must be examined is the effect the respondent father's undertakings may have on the above determination. In order to facilitate the return of M. to Scotland, the respondent has undertaken not to take physical custody of the child upon his return to Scotland and not until a court permits such custody. He has also undertaken to bring proceedings in Scotland that will enable a court to determine within approximately five weeks of M.'s return the issue of his care and control. My colleagues are of the view that such undertakings are sufficient to remedy any difficulties that may arise as a result of implementing return under the Convention and that they render unnecessary a transitory order such as that proposed by Helper J.A. I disagree.

Undertakings such as those of the respondent in this case are to be commended. They are often made in cases where an applicant seeks the return of a child under the Convention. They have been approved of, for example, in P. v. P. (Minors) (Child Abduction), [1992] 1 F.L.R. 155 (Eng. H.C. (Fam. Div.)), where the order for return was contingent upon certain undertakings. Similarly, undertakings were also approved of in C. v. C. (Minor: Abduction. Rights of Custody Abroad). [1989] 2 All E.R. 465 (C.A.), at pp. 469-70, in which Butler-Sloss L.J. held:

Those [undertakings], as far as they go, are very valuable, and, if I may say so, for my part, show the good intent that he has for the welfare of his child and to return him to the jurisdiction of the Australian court. In my view, those undertakings should go somewhat further. and the undertakings that I for my part think should be required of this father, as a prerequisite for the return of the child, and without which I would consider the child should not be expected to return, are as follows.... [Emphasis added.]

In the case at hand, I note that, while the undertakings offered by the respondent may provide some assurance that the interests of the child will be protected, it is only when the child is returned to Scotland that they will take effect, if, in fact, they are respected. Although in no way am I suggesting that the respondent will not respect his undertakings and neither do I have any doubt that they mere made in good faith, it remains that, since the Manitoba courts have jurisdiction to make transitory orders in virtue of the CCEA, they must consider the best may to insure that the child s best interests are taken into account upon ordering the return from the haven state to the requesting country. Therefore, even if the undertakings before us had been in front of Helper J.A., which they were not, I believe that she would have been justified in making the order she proposed, given in particular that the undertakings by the respondent will only take effect once the child is returned to

Scotland, will therefore be difficult to enforce, and do not provide for interim and transitory measures pending the return.

Conclusion

In conclusion, as set out above, the Convention has been recognized by the international community in order to protect the best interests of children. In Manitoba, the Convention has been implemented by the CCEA, which, in light of the best interests of children, seeks to expand on the provisions of the Convention. There is no conflict between the Convention and the CCEA but, rather, they complement each other. According to the CCEA, the Manitoba courts, in this particular instance, had jurisdiction to make a transitory order on the condition that such order did not conflict with or frustrate the objective of prompt return under the Convention and that it fostered the best interests of the child. Such transitory orders are available to the court pursuant to the CCEA and, in the proper circumstances, are consistent with the wording and intent of the Convention. The Convention as well as the CCEA make it absolutely clear that the best interests of the child must prevail at all times and must be the paramount consideration when enforcing the return of a child pursuant to the Convention. Helper J.A. was well within her jurisdiction to adopt such a transitory order in M.'s best interests, independent of the undertakings by the respondent before our court. She exercised that jurisdiction properly given the facts of this case.

Nonetheless, since at the time of this hearing it had already been three months since Helper J.A. first proposed her order and an order such as Helper J.A.'s is to be transitory in nature, I would not further delay the return of the child by making a similar transitory order. Therefore, I join my colleagues in dismissing this appeal and ordering the immediate return of M. to Scotland.

The following are the reasons delivered by

MAJOR J.:

I agree with Mr. Justice La Forest that the appellant's removal of her son, M., from Scotland to the province of Manitoba in Canada, constituted a breach of the custody right of the Scottish court within the meaning of Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction, Can. T.S. 1983, No. 35. Article 12 of the Convention, therefore, charges this Court to order his return forthwith.

Appeal dismissed.

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Solicitor for the intervener the Attorney General of Canada: John C. Tait, Ottawa.

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