Children's Legal Rights to be Heard in Cross-Border Parental Child Abduction Cases[1]

The Honourable Donna Martinson, Q.C., LL.M[2]

The Challenges – An Overview

Most of the discussions relating to the rights of children to be heard in cross-border child abduction cases have focused on the discrete defence that can be raised when a court deals with an application to return a child to the jurisdiction from which the child was taken. The defence, found in Article 13 of the 1980 ***Hague Convention on International Child Abduction***[3] (the ***Hague Convention***) gives a judge the discretion to refuse to order a return if the court 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". That is the only specific reference in the ***Hague Convention*** to children's ability to participate in the return application proceeding.

Yet children, including those involved in Hague proceedings, have other much broader participatory rights. The ***United Nations Convention on the Rights of the Child***[4] (the UNCRC), ratified by Canada in 1991, gives all children who are capable of forming their own views the right to express those views in all matters affecting the child and in particular in judicial proceedings. In addition, the child has the right to have his or her views given "due weight in accordance with the age and maturity of the child."[5] A fundamental principle of the UNCRC is that it is in children's best interests to have the right to participate; participatory rights and their best interests are inextricably linked. The UNCRC also applies in many cross-border child abduction cases to which the ***Hague Convention*** does not apply. These include: a child brought from or taken to a non-signatory country; a child brought from or taken to another province or territory within Canada; and a child over the age of 16.

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[1] Prepared for: ***Cross Border Child Custody Disputes – Judicial Networking and Direct Judicial Communication***, Judicial Officers Pre-Institute, Association of Family and Conciliation Courts, May 28, 2014, Toronto, Ontario. (This paper is an updated version of a paper by the same name prepared for the National Judicial Institute Atlantic Courts Education Seminar for Federally Appointed Judges: Martinson J., *Cross-Border Child Abduction and Other Relocation Issues*, Moncton, New Brunswick, Canada, November 1, 2011.)

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[3] Can. T.S. No. 3. While the ***Hague Convention*** has been incorporated into Canada's domestic law and the UNCRC has not, the principles found in the UNCRC will inform the interpretation of the ***Hague Convention***.

[4] Can. T.S. 1992, No. 3.

[5] Article 12. Note that Article 35 of the UNCRC provides that state parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of children for any purpose in any form.

The ultimate decision in a Hague return application, as well as decisions on the issues that must, by law, be decided in reaching the ultimate decision, unquestionably affect the child and therefore engage Article 12 of the UNCRC. These include decisions such as: where the child habitually resides; whether the child is, after a year, settled in the child's new environment; whether there has been consent or acquiescence; and whether there is a grave risk that a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. These are distinct issues from the question of whether the child objects to the return. The views of the child on such issues may or may not support a return order, while a child's objection invariably supports an application to refuse to return the child.

The UNCRC emphasizes the importance of children's participatory rights in proceedings affecting them, rights that may take time to implement. On the other hand, the ***Hague Convention*** has the objectives of not only preventing international child abduction, but also ensuring that children who are abducted are returned to their state of habitual residence in a timely way so that their broad, long term best interests can be determined by that state. Many Hague cases dealing with the Article 13 child objection defence emphasize the particular challenges that arise in assessing the reliability of statements made by children in parental abduction cases. When a child who has been unilaterally removed from the care of one parent and is in the exclusive or almost exclusive care of the other, undue influence may be at play.[6]

In spite of the objective of timely returns in Hague cases, courts in those cases are increasingly recognizing both that children's interests are affected when specific decisions are made at return applications, and their participation can be important. The grave risk of harm exception is an example.[7] The United Kingdom Supreme Court has concluded that children's views can be relevant to the question of the habitual residence of a child[8] and to whether a child is settled in his or her new environment,[9] and has considered joining children as parties to the return application proceedings.

Judges, lawyers and others dealing with child abduction cases face challenges when trying to find the right balance among these important and sometimes conflicting legal principles. The tension between the legislative objectives is captured by Professor Nicholas Bala, Max Blitt Q.C., and Helen Blackburn (Bala, Blitt and Blackburn) very well in their introduction to their April 4, 2014 commentary, ***The Hague Convention and the Rights of Children*****.** They state that while "*Hague* proceedings are intended to be

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[6] Professor Nicholas Bala, Max Blitt Q.C. and Helen Blackburn also make this point in their April 4, 2014 commentary, ***The Hague Convention and the Rights of Children***, The International Bar Association *Family Law Newsletter*, April 4, 2014, at p. 5.

[7] See the discussion dealing with this Article 13(b) defence in The Hon. Donna Martinson and Melissa Gregg, ***Cross-Border Child Abduction Cases – Social Context* Issues,** prepared for *Cross Border Child Custody Disputes – Judicial Networking and Direct Judicial Communication*, Judicial Officers Pre-Institute, Association of Family and Conciliation Courts, May 28, 2014, Toronto, Ontario.

[8] ***In the Matter of LC***, 2014 UKSC 1.

[9] ***In re M (Children) (Abduction: Rights of Custody)*** [2007] UKHL 55.

summary and not to address the best interests of children, let alone engage their rights, children are nevertheless profoundly affected by them."[10]

Children's participatory rights don't just apply to the formal return application. They extend to all stages of the judicial process, including case management hearings, judicial settlement discussions and mediations relating to the court proceedings. Communication between courts in the two jurisdictions involved, with appropriate safeguards, can help ensure that a child can participate throughout the proceedings in an effective way, with appropriate legal advice. It can also assist in preventing the child from having to repeatedly express his or her views to various judges, at different times, in different jurisdictions.

The questions of if, when and how children participate in cross-border parental child abduction cases raise important access to justice for children questions. Recent Canadian access to justice reports identify significant access to justice problems for people generally. These problems become more acute for children, and for vulnerable children in particular. On the question of legal representation, children in some parts of the country have relatively easy access to a lawyer, while children in other parts have little or no access. The same problem applies to the ability to access professional reports that facilitate children's participation; any requirement that there must be an expert report could operate as a barrier to access to justice for children in parental child abduction cases.

Access to justice for children concerns were also raised in the United Nations ***Concluding Commentary: Canada****,* a report by the United Nations Committee on the Rights of the Child, in October 2012. While the Committee commended Canada on some things it has done, it also found Canada falls short in several areas. Under the heading *Respect of the views of the* child, it says the Committee is "concerned that there are inadequate mechanisms for facilitating meaningful and empowered child participation in legal, policy, environmental issues, and administrative processes that impact children."[11]

This paper considers these challenges further under these headings:

A. General Access to Justice Challenges Facing Children in Canada

B. Children's General Participatory Rights

1. Internationally
2. In Canada
   a. General Principles
   b. The Divorce Act
   c. Provincial Territorial Legislation

[10] Above, note 6 at p. 1.
[11] Committee on the Rights of the Child, United Nations Sixty first session, 5 October 2012, at para. 36.

C. Selected Issues in the Child Abduction Case Law

1. Article 13 Hague Convention Principles
2. Article 13 Evidence Requirements
3. Relationship between the Hague Convention and the UNCRC
4. Children as Parties to Proceedings

D. Judicial Communication and Children's Participation

A. Access to Justice Challenges Facing Children in Canada

Dr. Nancy Bell and I have considered the implications for children of recent Canadian access to justice reports.[12] We argue that achieving justice for children is a critical benchmark for measuring how well a society treats its most vulnerable citizens. We note that there are challenges, however, to children realizing their rights, including their participatory rights. Family law decisions can affect children in their daily lives in profound ways. Recent reports on civil and family access to justice highlight serious access to justice problems in Canada – problems which apply to children as well as adults and which can be particularly harsh for children generally and vulnerable children in particular.[13] The National Access to Justice Committee's report, *A Roadmap for Change,* finds that the **"**…family justice system is too complex, too slow and too expensive…and too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve."[14]

Collectively, these reports conclude that: legal problems are pervasive in people's everyday lives; access problems intensify for vulnerable people who may face multiple disadvantages; legal problems can multiple, impacting all aspects of their lives; lack of financial and other resources can be significant barriers for individuals wanting access to justice; and the legal aid system is failing the people of Canada. These conclusions impact children, who may face additional problems such as their (and their advocates') lack of understanding about entitlements; inadequate participation in judicial/administrative processes; systemic harm; and poor outcomes.

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[12] D. Martinson and N. Bell, ***Legal Professionalism and Access to Justice: Lawyers as Champions for Children*****.** The Verdict, BC Trial Lawyers' Association, April 2014. It can also be found at on the Canadian Association for Legal Ethics website:

http://ethicsincanada.com/2014/02/20/d-martinson-and-n-bell-legal-professionalism-and-access-to-justice-lawyers-as-champions-for-children/

The Hon. Donna. Martinson and Dr. Nancy Bell, *Lawyers as Leaders: Legal Professionalism and Access to Justice for* Children, April 2014, the Family Way, the Canadian Bar Association National Family Law Section Newsletter..

[13] See: *Access to Civil and Family Justice, A Roadmap for Change***,** Final Report of the National Action Committee on Civil and Family Justice**,** October 2013; *Reaching Equal Justice*, the Canadian Bar Association, August 2013,; *Reaching Equal Justice: An Invitation to Envision and* Act, Canadian Bar Association, December 2013; *Foundation for Change,* Report of the Public Commission on Legal Aid in British Columbia, March 2011.

[14] *A Roadmap for Change*, above, note 13 at p. 01.

The Family Law Working Group report states, for example, that "the majority of family cases involve children, who are vulnerable, usually *unrepresented non-parties* (italics added) who seldom participate directly in the process."[15] Children's ability to access legal advice in family law cases is not only challenging generally, but varies from jurisdiction to jurisdiction within Canada. By way of example, Ontario has the Office of the Children's Lawyer, whereas British Columbia has no such service for children.

As mentioned in the Overview, the UN Committee on the Rights of the Child, in its ***Concluding Observations: Canada***, has identified some significant access to justice concerns faced by children. The Committee recommends that Canada continue to take steps to ensure the implementation of the Article 12 right of the child to be heard. In doing that, the views of the child should be "a requirement for all official decision-making processes that relate to children…"[16] The Committee also "urges" Canada to ensure that children have the possibility to voice their complaints if their right to be heard in judicial or administrative proceedings is violated; there should be access to an appeals procedure.[17]

B. Children's General Participatory Rights

The Yukon Supreme Court considered children's legal rights to be heard in 2010, in ***B.J.G. v. D.L.G***.[18] The United Nations Committee on the Rights of the Child in its October 2012 concluding observations said that it "welcomes the state Party's Yukon Supreme Court decision in 2010 which ruled that all children have the right to be heard in custody cases", before it went on to observe, as noted above, that there are inadequate mechanisms for facilitating meaningful and empowered child participation.[19] Unless otherwise noted the statements in this section of the paper are taken from the 2010 Yukon case.

1. Internationally

The UNCRC is an international instrument dealing with children's participation in proceedings that affect them. It applies to all custody proceedings.

As noted earlier, Article 12 of that UN Convention says that children who are capable of forming their own views have the legal right to express those views in all matters affecting them, including judicial proceedings. In addition, it provides that they have the legal right to have those views given due weight in accordance with their age and maturity. Specifically, Article 12 says that:

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[15] *A Roadmap for Change*, above note 13 at p. 01.
[16] Committee on the Rights of the Child, United Nations Sixty first session, 5 October 2012, at para. 37.
[17] Committee on the Rights of the Child, United Nations Sixty first session, 5 October 2012, at para. 37.
[18] 2010 YKSC 44. This was my decision, made while sitting as a Deputy Judge of the Yukon Supreme Court.

[19] Committee on the Rights of the Child, United Nations Sixty first session, 5 October 2012, at para. 36.

> State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Children therefore have these rights in any judicial proceeding affecting the child.

The legal rights to be heard found in Article 12 apply to all children. There is no ambiguity in the language used in Article 12. The UNCRC is very clear; *all* children have these legal rights to be heard, without discrimination. A child means *every human being* below the age of eighteen years (unless under the law applicable to the child, majority is attained earlier): Article 1. Signatories are required to respect and ensure the rights set forth in the Convention to *each child within their jurisdiction without discrimination of any kind*: Article 2(1).

The UNCRC does not make an exception for any category of case. It does not give decision makers the discretion to disregard the legal rights contained in it in relocation cases because of the particular circumstances of the case or the view the decision maker may hold about children's participation.[20]

A key premise of the legal rights to be heard found in the UNCRC is that hearing from children is in their best interests. Many children want to be heard and they understand the difference between having a say and making the decision. Hearing from them can lead to better decisions that have a greater chance of success. Not hearing from them can have short and long term adverse consequences for them.[21]

There is still some discussion and debate about the wisdom of hearing from children in complex cases such as those involving relocation, child abduction, or other often high conflict cases. Some of the concerns raised are that: it is harmful to children and an unfair burden on them to place them in the middle of the conflict; they can be easily manipulated; there could be serious repercussions if a parent does not like what they say; and what they say might not be reliable or useful.[22]

However, the terms of the UNCRC creating the legal rights to be heard resulted from a critical policy decision. That is, the choice was made by international lawmakers that there are compelling reasons for affording these rights to be heard to all children as part of the determination of what is in their best interests. They concluded that the concerns

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[20] *B.J.G. v. D.L.G.*, above, note 18 at paras. 12-13.

[21] *B.J.G. v. D.L.G.*, above note 18 at paras. 18 - 24.

[22] *B.J.G. v. D.L.G.*, above note 18, at para. 15.

raised can be dealt with appropriately for all children in all cases, within the flexible framework provided by the UNCRC.[23]

In 2013, after *B.J.G. v. D.L.G.* was decided, the UN issued a General Commentary to the *United Nations Convention on the Rights of the Child* (2013) (UN Commentary 14)[24] addressing children's best interests. Dr. Bell and I also discussed children's best interests and their participatory rights, and the UN Commentary, in our recent articles.[25] Among the UNCRC articles considered in UN Commentary 14 are Article 12 and Article 3(1), the one that says in "all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

UN Commentary 14 describes "the inextricable links between articles 3, paragraph 1, and 12."[26] It explains how the assessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight given to those views in all matters affecting them:[27]

> …The two articles [Article 3 and Article 12] have complementary roles: the first aims to realize the child's best interests, and the second provides the methodology for hearing the views of the child or children and their inclusion in all matters affecting the child, including the assessment of his or her best interests. *Article 3, paragraph 1, cannot be correctly applied if the requirements of article 12 are not met. Similarly, article 3, paragraph 1, reinforces the functionality of article 12, by facilitating the essential role of children in all decisions affecting them.* (italics added)

While UNCRC articles have equal relevance, there are four overarching fundamental principles reflected within the UNCRC: best interests, survival/development, non-discrimination, and participation. UNCRC article 12 is often viewed as the preeminent article granting children the right to express their views. However, it needs to be interpreted and implemented in association with other UNCRC articles with child participation seen as associated with processes, rather than as a momentary act (see UN Committee's General Comment No. 12[28]). Article 12 also must be interpreted as understanding that children have the right to receive information (article 13) so as to better inform their views and, secondly, that children have the right to decide *not* to express their views or participate in decision-making processes.

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[23] *B.J.G. v. D.L.G.*, above note 18 at para. 16 and paras. 25 - 30.

[24] General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3 para 1), Committee on the Rights of the Children, adopted at its 66th session (14 January – 1 February 2013).

[25] Above, note 12.

[26] General Comment 14, above, note 24 at para. 43.

[27] General Comment No. 14, above, note 24 at para. 43.

[28] United Nations Convention on the Rights of the Child, General Comment No. 12 (2009), *The right of the child to be heard*, at para. 13..

Children's participatory rights, or 'self-expression' rights, apply to and are informed by other articles: article 2 (non-discrimination); article 6 (life, survival, development); article 9 (separation from parents); article 21 (adoption); article 37 (torture, degrading and deprivation of liberty); and article 40 (administration of juvenile justice). The 'evolving capacities' articles, in addition to articles 12 and 13 (freedom of expression), encompass article 5 (parent, guardian, community responsibilities); article 14 (freedom of thought), article 15 (freedom of assembly), article 17 (access to information), article 23 (special support for disabled children), article 29 (education for personal fulfillment, responsible citizenship), and article 31 (leisure, play and culture).[29]

Another international instrument that recognizes the importance of children's participation is the 1996 Hague Children's Convention, formally called the *Hague Convention of 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measure for the Protection of Children.*[30] This Convention provides common jurisdictional rules and provisions for recognition and enforcement of custody and access orders by operation of law. Where a measure is enforceable in one state and requires enforcement in another, these measures would upon application be declared enforceable or registered for enforcement according to the procedures of that state.

Under this Convention, the participation of children in the process leading up to the making of the original order is significant. An order will not be enforced if "a measure was taken in the context of a hearing without the child being provided the opportunity to be heard in violation of the fundamental principles of procedure in the requesting State."[31]

While the 1996 Hague Children's Convention was signed by the United States in October 2010, (indicating an intention to ratify), it has not yet been signed or ratified by Canada. The Canadian Federal Department of Justice is assessing whether the Children's Convention ought to be ratified. One of the challenges for Canada is that many of the issues dealt with by the Convention fall within provincial/territorial jurisdiction.

Internationally, approaches to children's participation in custody cases vary from jurisdictions that always require input from children, sometimes with the assistance of legal counsel, to giving discretion to judges, to never hearing from children. The methods can vary as well. Judicial interviews are always, sometimes, or never used.

2. ***Children's Legal Rights to be Heard in Canada***

[29] United Nations Convention on the Rights of the Child, General Comment No. 12 (2009), *The right of the child to be heard*, at para. 13..

[30] October 19, 1996, entered into force January 1, 2002.

[31] Article 23.

a. General Legal Principles

Children in Canada have legal rights to be heard in all custody cases.[32] As noted earlier Canada ratified the UNCRC in 1991. Canada has chosen not to incorporate the provisions of the UN Convention directly into domestic law because it takes the position that Canadian domestic law complies with the Convention. Canadian jurisprudence supports this interpretation.

In 1999 the Supreme Court of Canada, in ***Baker v. Canada (Minister of Citizenship and Immigration)***[33] concluded that Parliament and Provincial Legislatures are presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible interpretations that reflect these values and principles are preferred.[34] The Court considered the UNCRC and concluded that the values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future.[35]

In 2009 the Supreme Court of Canada specifically dealt with input from children and Article 12 of the UNCRC in ***A.C. v. Manitoba (Director of Child Services),***[36] stating that, "…With our evolving understanding has come the recognition that the quality of decision making about a child is enhanced by input from the child."[37] (The Court also said that the extent to which that input affects the best interests assessment is as variable as the child's circumstances, but one thing that can be said with certainty is that the input becomes increasingly determinative as the child matures.)

The Court concluded that this approach is consistent with the international instruments to which Canada is a signatory, including Article 12 of the UNCRC:[38]

> [93] Such a robust conception of the "best interests of the child" standard is also consistent with international instruments to which Canada is a signatory. The *Convention on the Rights of the Child,* Can. T.S. 1992 No. 3, which Canada signed on May 28, 1990 and ratified on December 13, 1991, describes the "best

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[32] *B.J.G. v. D.L.G.*, above, note 18; *Hear the Child - the Legal Framework : Why Children in Canada Have the Legal Right to be Heard*, Family Law Matters Newsletter, April 2010 No. 323 (CCH – a Walters Kluwer business). *B.J.B. v. D.L.B.* has been cited in a number of Canadian decisions. For example, the British Columbia Supreme Court, in *N.M.K. v. R.W.F.*, 2011 BCSC 1666, a case of alleged parental alienation decided under the ***Divorce Act***, said that "children in Canada have a legal right to be heard in all matters affecting them." (at para. 199) Madam Justice Wedge concluded that the right is rooted in both the ***Convention*** and Canadian domestic law.

[33] [1999] 2 SCR 817.

[34] At para 70.

[35] At para 71.

[36] 2009 SCC 30.

[37] Above, note 36 at para. 92.

[38] Above, note 36 at para. 93.

> interests of the child" as a primary consideration in all actions concerning children (Article 3). It then sets out a framework under which the child's own input will inform the content of the "best interests" standard, with the weight accorded to these views increasing in relation to the child's developing maturity. Articles 5 and 14 of the Convention, for example, require State Parties to respect the responsibilities, rights and duties of parents to provide direction to the child in exercising his or her rights under the Convention, "in a manner consistent with the evolving capacities of the child". Similarly, Article12 requires State Parties to "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child"….

Parliament and Provincial and Territorial legislatures are therefore presumed to respect the rights and values set out in the UNCRC. The broad, child focused best interests of children test found in the ***Divorce Act*** includes children's legal rights to be heard found in the Convention. Provincial legislation gives children legal rights to be heard and should also be interpreted to reflect the values and principles found in the Convention.[39]

B.J.G. v. D.L.G.,[40] considered Article 12 of the UNCRC and domestic law, and discussed reasons underlying the legal rights to be heard found in it:

> [18] I will summarize many of the reasons underlying the legal rights to be heard found in the social science literature by referring to what children want, the benefits of their input to the decision making process, and the adverse consequences for them of excluding their participation. (For details see Rachel Birnbaum, *The Voice of the Child in Separation/Divorce Mediations and Other Alternative Dispute Resolution Processes: A Literature Review*, June 2009, prepared for the Canadian Department of Justice; Joan B. Kelly, *Child Participation in Divorce Processes: The Structured Child-Focused Interview Process,* prepared for a joint conference, Hear the Child, sponsored by the British Columbia Continuing Legal Education Society and the International Institute for Child Rights and Development, Vancouver, British Columbia, November 19-20, 2009; and Birnbaum, R., Fidler, B.J., & Kavassalis, K., "Children's Views and Preferences", in *Child Custody Assessments: A Resource Guide for Legal and Mental Health Professionals.* 2008, Toronto, Canada: Thomson Carswell.)
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> 1. What Children Want
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> [19] Most children are not informed about their parent's separation, how the separation will affect them, or given a chance to ask questions. The majority of children have a parenting plan imposed on them without any discussion. They are not asked for suggestions regarding living arrangements or subsequent changes in the schedule.

[39] *B.J.G. v. D.L.G,* above, note 18 at 37 – 46.
[40] Above, note 18.

[20] Yet, most children are clear. They want to be involved and heard in some way in matters that affect them. They think that being heard leads to better outcomes. They understand the difference between providing input and making decisions. They prefer voluntary input and want the right not to be heard. Many wish they could talk with family members rather than professionals.

2. The Benefits to the Decision Making Process

[21] Obtaining information of all sorts from children, including younger children, on a wide range of topics relevant to the dispute, can lead to better decisions for children that have a greater chance of working successfully. They have important information to offer about such things as schedules, including time spent with each parent, that work for them, extra-curricular activities and lessons, vacations, schools, and exchanges between their two homes and how these work best. They can also speak about what their life is like from their point of view, including the impact of the separation on them as well as the impact of the conduct of their parents.

[22] Receiving children's input early in the process, and throughout as appropriate, can reduce conflict by focusing or refocusing matters on the children and what is important to them. It can reduce the intensity and duration of the conflict and enhance conciliation between parents so that they can communicate more effectively for the benefit of their child. When children are actively involved in problem solving and given recognition that their ideas are important and are being heard, they are empowered and their confidence and self-esteem grow. They feel that they have been treated with dignity. In addition, children's participation in the decision making process correlates positively with their ability to adapt to a newly reconfigured family.

3. Short and Long Term Adverse Consequences of Exclusion for Children

[23] Excluding children and adolescents may have immediate adverse effects such as: feeling ignored, isolated and lonely; experiencing anxiety and fear; being sad, depressed, and withdrawn; being confused; being angry at being left out; and having difficulty coping with stress.

[24] Further, longer-term adverse effects of not consulting children and adolescents may include: loss of closeness in parent-child relationships; continuing resentment if living arrangements don't meet their needs in time or structure; less satisfaction with parenting plans, less compliance, more "voting with their feet"; and longing for more or less time with the non-resident parent.

b. The Divorce Act

As just noted, the provisions of the ***Divorce Act*** are presumed to reflect the values and principles found in the UNCRC. The ***Divorce Act*** provides that in making custody and access decisions the court "shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child." s. 16 (8). It has as its focus the best interests of children.

Canadian jurisprudence, in cases such as ***Young v. Young***,[41] and ***Gordon v. Goertz***,[42] favours a broad and flexible approach to the best interests test which is child centred, focusing on the child's perspective, not that of the adults involved. Taking a broad and flexible child centred approach, the best interests provisions should be interpreted to reflect the fact that, by virtue of international law, the rights to participate in the decision making process are an integral part of the determination of a child's best interests.[43] The Supreme Court of Canada used such an approach to the best interests question in relation to children's participation in ***A.C. v. Manitoba (Director of Child Services)***.[44]

While the *Divorce Act* does not specifically refer to children's legal rights to be heard, judges in divorce proceedings do take into consideration the views of the child as one of the relevant factors in determining a child's best interests. The British Columbia Supreme Court was faced with this issue in 2002 in ***L.E.G. v. A.G***, a cased decided under the *Divorce Act,* Canada has an obligation to ensure that children have the chance to make their views known:[45]

> Canada also has an international obligation to make sure that children have an opportunity to make their views known in custody decisions affecting them. Article 12 of the *United Nations Convention on the Rights of the Child*, Can. T.S. 1992, No. 3, which has been ratified by Canada, requires that children be given opportunities to participate in legal proceedings:
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> (Article 12 of the *Convention* is quoted)

c. <u>Provincial and Territorial Family Law Legislation</u>

It is beyond the scope of this paper to examine all of the legislative provisions in Canada dealing with children's views and wishes. Rather, I will provide examples of the kinds of provisions found.

British Columbia's former legislation, the ***Family Relations Act*** is an example of legislation using the phrase "if appropriate." That Act specifically recognized the importance of considering children's views in determining their best interests. Section

[41] [1993] 4 S.C.R. 3

[42] [1996] 2 S.C.R.27.

[43] *B.J.G. v. D.L.G.*, above, note 18 at paras. 42 to 46.

[44] Above, note 36.

[45] 2002 BCSC 1455 at para. 17, Martinson J.

24(1)(b) requires the judge to consider, "if appropriate, the views of the child." In my respectful view the phrase inappropriate, when used in provincial or territorial legislation should, in keeping with the legal rights of children to be heard entrenched in the UNCRC, be interpreted to mean that if children are capable of forming their own views and want to participate, it will be appropriate for them to do so.

British Columbia's new ***Family Law Act***, which came into force on March 18, 2013, provides that parents, in making an agreement, and the Court:

- must consider the child's views, unless it would be inappropriate to consider them: s. 37(2)(b).

The words "unless it would be inappropriate to consider them" should also be interpreted in light of the provisions of Article 12 of the UNCRC.[46]

Another approach is to require the Court to consider the views and preferences of the child, if those views can be reasonably determined. In ***B.J.G. v. D.L.G.***,[47] the Yukon Supreme Court interpreted the relevant Yukon legislation, using that test, in a way that reflected the values and principles found in the U.N. Convention:

> [44] The Yukon`s *Children`s Law Act*, R.S.Y. 2002, c. 31, amended by: S.Y. 2003, c. 21, s. 6; S.Y. 2008, c. 1, s. 199, specifically requires the Court to consider the views and preferences of the child in determining the child`s best interests, if those views and preferences can be reasonably determined: s. 30(1)(c). This provision, and the ones found in other provincial and territorial statutes, will be interpreted to reflect the values and principles found in the *Convention.*

In Quebec, Art. 34 of the ***Civil Code*** provides that the "court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it." Ontario's ***Children's Law Reform Act*** states:

> Child entitled to be heard
>
> 64(1) In considering an application under this Part, a court where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them.
>
> Interview by court
>
> 64(2) The court may interview the child to determine the views and preferences of the child.

[46] http://www2.ohchr.org/english/law/crc.htm
[47] Above, note 18.

New Brunswick's ***Family Service Act***[48] deals with children's wishes. Best interests of the child means the best interests of the child under the circumstances, taking into account:

> (b) the views and preferences of the child, where such views and preferences can be reasonably ascertained.

New Brunswick enacted comprehensive provisions elaborating on this general right to be heard. Section 6 of that Act in many ways reflects the provisions of Article 12 of the *UN Convention*:

> 6(1) In the exercise of any authority under this Act given to any person to make a decision that affects a child, the child's wishes, where they can be expressed and where the child is capable of understanding the nature of any choices that may be available to him, shall be given consideration in determining his interests and concerns, and the interests and concerns of the child shall be given consideration as distinct interests and concerns, separate from those of any other person.
>
> 6(2) Where the wishes of a child have not been or cannot be expressed or the child is incapable of understanding the nature of the choices that may be available to him, the Minister shall make every effort to identify the child's interests and concerns and shall give consideration to them as distinct interests and concerns separate from those of any other person.
>
> 6(3) A person who is authorized under this Act to make a decision that affects a child may, in order to comply with subsection (1), consult directly with the child, in which case he shall do so in camera unless he determines that to do so would not be in the best interests of the child; and in consulting with the child in camera the person may exclude any person, including any party to a proceeding and his counsel, from participating in or observing the consultation.
>
> 6(4) In any matter or proceeding under this Act affecting a child, whether before a court or any person having authority to make a decision that affects a child, the child has the right to be heard either on his own behalf or through his parent or another responsible spokesman.
>
> 6(5) In any proceeding under this Act the court may waive any requirement that the child appear before the court where it is of the opinion that it would be in the best interests of the child to do so and the court is satisfied that the interests and concerns of the child with respect to the matter before the court will not be thereby prejudiced.

d. Implementing Children's Legal Rights to be Heard

[48] 1981 Statutes of NB, chapter F-2.2.

In my respectful view, which I expressed in ***B.J.G. v. D.L.G.***,[49] more than just lip service must be paid to children's legal rights to be heard. Because of the importance of children's participation to the quality of the decision and to their short and long term best interests, the participation must be meaningful; children should:

1. be informed, at the beginning of the process, of their legal rights to be heard;

2. be given the opportunity to fully participate early and throughout the process, including being involved in judicial family case conferences, settlement conferences, and court hearings or trials;

3. have a say in the manner in which they participate so that they do so in a way that works effectively for them;

4. have their views considered in a substantive way; and

5. be informed of both the result reached and the way in which their views have been taken into account.

Separate legal representation for children is an effective way of making sure that the participation of children is meaningful.

An inquiry should be made in each case, and at the start of the process, to determine whether the child is capable of forming his or her own views, and if so, whether the child wishes to participate. If the child does wish to participate then there should be a determination of the method by which the child will participate. While the views of parents about participation are relevant, they are not determinative.

Decisions about whether, when and how children should participate in child abduction cases are particularly challenging. As noted in the overview, there is a tension between the need to make sure that children's views are effectively heard and the need to make sure that the decision as to whether there should be a return is made quickly.

C. Selected Issues in the Child Abduction Case Law

1. Article 13 Hague Principles

When a child objects to a return, thereby engaging Article 13 of the ***Hague Convention,*** Canadian courts have accepted that even if the child has attained an age and degree of maturity at which it is appropriate to take account of the child's views, the judge still has a broad discretion to return the child after taking the objection, in the context of all of the evidence, and the objectives of the Convention, into account. The analysis is also viewed somewhat differently if the child is a Convention refugee.

[49] I have expanded upon the views expressed in this section in *B.J.G. v. D.L.G.*, above, note 18 at paras. 47 to 62.

Beatty v. Schatz provides an example of the kinds of issues that can arise when a judge applies Article 13 of the 1980 *Hague Convention*.[50] The mother, Ms. Schatz, applied for the return of Alex, who was 11, to Ireland. He has been in British Columbia with his father, Mr. Schatz for several months. Mr. Schatz opposed the return saying that Alex was adamant that he did not want to return and is of an age and has the maturity to make that decision. The parents shared joint custody in Ireland, and Mr. Schatz's application for sole custody so that so that Alex could live with him in Canada was before the Irish Courts. At the same time as he made that application he asked for the permission of the Irish Court to bring Alex to Canada for a one month vacation. He gave a sworn undertaking to the Irish Court to return him. He did not do so and instead enrolled Alex in school. It was then that Alex began to say that he did not want to return to Ireland. Mr. Schatz took the view throughout the proceedings that it was entirely a decision between Alex and his mother; Mr. Schatz would not even speak to Ms. Schatz directly. Rather, he encouraged Alex to speak to his mother himself.

The British Columbia Supreme Court expressed this view about the judicial discretion found in Article 13:

> [33] There can be little doubt that the views of children can be very important in decisions that affect their best interests. Children should normally "have a voice" in these important decisions that can have such a significant impact on their lives: *L.E.G v. A.G.*, 2002 BCSC 1455.
>
> [34] At the trial of this matter, whether it is here or in Ireland, A's views and their significance will be important factors.
>
> [35] The *Hague Convention* considerations are somewhat different. The *Hague Convention* does say in Article 13 that the Court may, not must, refuse to order the return of the child if the Court 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 the child's views.
>
> [36] The Court would need to know whether the child objects and why, and if the child has reached that age and degree of maturity. The concept of maturity includes the ability to sift through what is happening and to make independent decisions not influenced unduly by either parent.

The Court directed that a *Views of the Child Report* be prepared by a psychologist, in spite of the objection by counsel for the mother. The psychologist concluded that Alex was of an age and had the degree of maturity required to take his views into account. He reported that Alex wanted to stay in British Columbia. The Court agreed that his views should be taken into account but ultimately concluded he should be returned to Ireland.

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[50] ***Beatty v. Schatz***, 2009 BCSC 707. I was assigned this case as the B.C. Supreme Court representative of the Canadian Network of Contact Judges.

The Court noted that different approaches to the interpretation of Article 13 have been expressed internationally and described the relevant principles this way:[51]

> Legal Principles
>
> [32] There have been different views expressed by courts around the world as to how the discretion found in Article 13 of the *Hague Convention* ought to be exercised. The views range from giving great weight to a child's views, to saying that a child's views should only prevail in the most exceptional circumstances. In my respectful view, the approach taken by the English House of Lords in *Re M*, [2007] UKHL 55, [2008] 1 All ER 1157, is the appropriate one.
>
> [33] In paras. 41 through 46, the House of Lords says that the discretion is at large. The court is entitled to take into account the various aspects of the *Hague Convention* policy, which is directed at not only the swift return of children, but also deterrence of abduction in the first place. Alongside that, the court can consider the circumstances which gave the court discretion in the first place, and the wider considerations of the child's rights and welfare. The House of Lords said that the *Hague Convention* objectives should not always be given more weight than the other considerations: sometimes they should and sometimes they should not.
>
> [34] In dealing specifically with cases in which the child objects, the House of Lords says the following at para. 46:
>
> > In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion come into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances. [Emphasis added]

[51] 2009 BCSC 706.

The British Columbia Court of Appeal confirmed the decision to return the child, notwithstanding the child's wishes, saying:[52]

> [20] The trial judge correctly interpreted Article 13 as giving her a discretion. She regarded A's wishes as one factor, certainly an important factor, to be considered amongst others, including the importance of ensuring that children are not wrongfully removed from their home jurisdictions or wrongfully retained elsewhere. Indeed, the objects of the Convention as stated in Article 2 are to secure the prompt return of such children and to ensure that rights of custody and access under the laws of contracting states are "effectively respected" in the others. These objectives were stressed by the Supreme Court of Canada in the seminal case of *Thomson v. Thomson*, [1994] 3 S.C.R. 551, where La Forest J for the majority stated:
>
> > The preamble ... 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 [the lower court'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 to 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 to secure 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. [at page 14]

[52] *Beatty v. Schatz*, 2009 BCCA 310.

> [21] In this case there was evidence to support the chambers judge's findings and inferences. She gave serious consideration to A's expressed wishes, but concluded that those wishes had been influenced by A's father and that the onus on Mr. Schatz to justify the continued retention of A in this jurisdiction was not met. I agree with counsel for Ms. Beatty that Mr. Schatz in addition to breaching his undertaking to the Irish court has not recognized his responsibility as a parent to act in A's interests, or realized the effect his attitude is having on A. Of course A loves his father and has enjoyed his time in Canada, where (until recently) he has been largely shielded from the consuming conflict between his parents. It is obvious that it would be in A's interests for both parents to overcome their hostility towards each other and not to use A as a pawn in their conflict. If this lesson can be learned, perhaps some good will come of this unfortunate episode.

More recently, in December 2013, the Alberta Court of Appeal considered the applicable principles in ***RM v. JS***.[53] That Court, like the British Columbia Court of Appeal, referred with approval to the comments of Lady Hale in ***Re M.***[54] The Court also concluded that the enquiry is complex[55] and referred with approval to comments of the Ontario Court of Justice. In the Ontario case, Justice Glenn discussed the level of maturity that would be required and suggested some "earmarks of maturity":[56]

> It would seem to me that, if one were to even consider the views of a child who was as young as age ten in the context of an Article 13 argument, the level of maturity would have to be quite extraordinary. The court might look at some of the following earmarks of maturity, such as:
>
> 1. whether this child had made good decisions of a substantial nature for herself in other situations;
>
> 2. whether she had the ability and opportunity to, and in fact had reasonably weighed the more important competing benefits and disadvantages in reaching her decision;
>
> 3. whether her decision was reached with a reasonable measure of independence;
>
> 4. whether her fears relating to returning to the home state appear reasonable, in the circumstances—in particular in this case:
>
> > (a) whether she had considered and understood that, even if the court acted on her wishes and allowed her to stay in Canada, her two younger sisters might have to return to England and leave her behind;

[53] 2013 ABCA 441.
[54] At para. 33 of the Alberta decision.
[55] The suggestion, at para. 25 that some expertise is called for is discussed under the heading, "Article 13 Evidence Requirement.
[56] Quoted at para. 25 of the Alberta decision.

> (b) whether she had considered not only the scenario of living with her mother if she were to return to England, but also, the alternative of living with her father if she were to return to England pursuant to any order of this court; and
>
> (c) whether she had a reasonable appreciation of the potential consequences of her decision, should the court act on her views, especially in regards to her future relationship with her mother.
>
> These are tall orders for a young child. The stronger the evidence that a child had touched some of these bases, the greater would be the court's comfort level in relying on this young child's views. Most ten-year-old children are never put in the position of having to demonstrate this level of maturity. In fact, one would never expect parents to place their child in a position of having to live with the consequences of making important "life" decisions using their as-yet undeveloped judgment. As children reach their teen years, assumptions can more readily be made about their maturity since they more regularly have opportunities to make important decisions for themselves on matters that younger children should never have to contemplate.

As noted above, particular considerations may apply when a child is a Convention refugee. In ***A.M.R.I. v. K.E.R***.[57] the Ontario Court of Appeal dealt with both a child's objection to a return and the child's right to participate in the ***Hague Convention*** return hearing, in a situation where the child had been declared a Convention refugee. As the court put it, "…this case is ultimately about the rights of a refugee child to be heard and to participate in a *Hague Convention* Application."[58]

At the time of the return hearing the child was almost 14 years old. She originally had lived with her mother in Mexico. A Mexican court order granted custody to the mother, with access to the father. She visited her father and paternal aunt in Toronto, accompanied by her maternal grandmother and an uncle. While in Toronto the child, supported by her maternal grandmother, alleged her mother treated her in an abusive manner. She did not want to return to Mexico. As a result, she applied successfully to be declared a Convention refugee. As is usual, her mother was not given notice of those proceedings and did not participate in them.

Her mother then applied in Ontario under the ***Hague Convention*** for an order returning the child to Mexico, denying the abuse allegations. The child was not given notice of the return hearing, her views and preferences were not sought and she was not represented by counsel.[59] The Court of Appeal said that the views of a child gain greater weight when the child is a Convention refugee. In these circumstances the court had "…no hesitation in concluding that the child was denied procedural fairness and

[57] 2011 ONCA 417.
[58] Above, note 57 at para 2.
[59] Above, note 57 at para. 122.

that her s. 7 *Charter* rights were infringed."[60] For these and other reasons, the decision to return was set aside and a new hearing directed.

2. ***Article 13 Evidence Requirements***

The issue of the kind of evidence required for an Article 13 defence was squarely before the Alberta Court of Appeal in ***RM v. JS***. Happily, experienced counsel was appointed on behalf of the child. That counsel, following a long established practice of the courts in Alberta, presented the views of the child and the child's position through the submissions of counsel. The court concluded that on the issues required to be decided the submissions of the lawyer did not amount to useful evidence, while emphasizing that the court made no criticism of counsel for the child.[61]

It provided several reasons for this conclusion.[62] One was the complexity of the matter, which it said requires some non-legal expertise which counsel did not have:[63]

> ...Determining the level of maturity of a child, particularly one who had recently turned 10 years old, is a difficult matter calling for some expertise…

And further on the appeal court said that the judge "needed the opinion of a qualified expert:"[64] The appeal court referred to an article by Alfred Mamo and Joanna Harris in which they state that "evidence about the child's wishes and view should be put before the court by a social worker or other child care professional, who has interviewed the child…"[65]

Another reason was that counsel's evidence on maturity was presented through submissions; counsel cannot give evidence without forsaking his or her position as counsel because of the inability of the other side to cross-examine. Counsel cannot express the child's views and preferences without the express consent of the other parties. Yet another problem identified was the court's inability to evaluate the basis upon which the child's seeming opinion about his preference for staying in Canada rested. The child's perspective should be weighed not only in light of the apparent maturity of the child, but also upon what the child actually knows or understands about the alternatives and also upon what other factors may have influenced the child's think, a matter an expert would look into.

Bala, Blitt and Blackman say that there is much to commend the approach of requiring evidence from a mental health professional rather than allowing child's counsel to in effect "give evidence from the table."[66] I agree with the concerns expressed with respect to evidence being presented by way of submission. It is also difficult, in theory, to disagree with the suggestion the expert evidence, if available, is helpful.

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[60] Above, note 57 at para. 122.
[61] Above, note 53, at para. 24. (Counsel for the child worked with an articling student.)
[62] Above, note 53 at paras. 25-34.
[63] Above, note 53 at para. 25
[64] Above, note 53 at para. 26
[65] Above, note 53 at para. 26
[66] Above, note 6 at p. 6

However, if the Alberta Court of Appeal was intending to say that for all such cases, expert evidence is needed, that requirement could, in my respectful opinion, operate as an insurmountable barrier to accessing the courts for many children. As noted earlier, the ability to access the courts is already very difficult for most children. In many areas of Canada children could not access legal advice, and would not be in a position to obtain an expert report in a child abduction case. Requiring them to have expert evidence as a pre-requisite to their participation would make the process completely inaccessible for many children and especially vulnerable children; doing so would not be consistent with the expansive approach to participatory rights found in the UNCRC.

In ***L.C.,*** decided in January 2014, the UK Supreme Court discussed ways in which evidence about a child's state of mind on the question of habitual residence might be presented. After deciding that the child should be joined as a party, and considering some participation options, the Court concluded that:[67]

> …In all probability however, the reasonable course would have been to confine [the child's] participation in the proceedings to: i) the adduction of a witness statement by her, or of a report by her guardian…; ii) her advocate's cross-examination of the mother; and iii) her advocate's closing submissions on her behalf.

In a May 1, 2014 decision of the England and Wales Court of Appeal, ***Re: KP***,[68] the Court considered the appropriateness of judicial interviews with children in a Hague case. In doing so, it made the more general comment that courts were still "feeling their way forward in order to determine how best to "hear" the voice of a child who is the subject of an application under the Hague Convention."[69] It added that what will be the appropriate way in which a child is heard will differ from case to case, and the "manner in which the task is undertaken will depend upon the developing skill and understanding of the judge and other professionals involved…"[70] Keeping that it mind, the Court found it possible to draw together themes which are common to the authorities:[71]

a) There is a presumption that a child will be heard during a Hague Convention proceedings, unless this appears inappropriate;

b) In this context, "hearing" the child involves listening to the child's point of view and hearing what they have to say;

c) The means of conveying a child's views to the court must be independent of the abducting parent

d) There are three possible channels though which a child may be heard:
   i) Report by a CAFASS officer or other professional;
   ii) Face to face interview with the judge;

[67] Above, note 8 at para. 55
[68] 2014 EWCA Civ 554
[69] Above, note 68 at para. 52
[70] Above, note 68 at para. 53
[71] Above, note 68 at para. 53 (case references omitted)

iii) Child being afforded full party status with legal representation;

e) In most cases an interview with the child by a specialist CAFCASS officer will suffice, but in other cases, especially where the child has asked to see the judge, it may also be necessary for the judge to meet the child. In only a few cases will legal representation be necessary;

f) Where a meeting takes place it is an opportunity:
   i) For the judge to hear what the child may wish to say; and
   ii) For the child to hear the judge explain the nature of the process and, in particular, why, despite hearing what the child may say, the court's order may direct a different outcome;

g) A meeting between judge and child may be appropriate when the child is asking to meet the judge, but there will also be cases where the judge of his or her own motion should attempt to engage the child in the process.

Guidelines for Meeting Children have been developed in the UK.[72] They provide, among other things, that the meetings are not for the purpose of gathering evidence. The Court of Appeal in ***KP*** referred to those guidelines and confirmed that the meeting is not to obtain evidence; rather it is primarily for the benefit of the child. It provided guidance for judges, which, In summary, is: i) that the role of the judge should be largely that of a passive recipient of whatever communication the child wants to transmit; ii) that as the purpose of the meeting is not to obtain evidence, the judge should not probe or seek to test what is said; iii) that a meeting held before the judge makes a decision, which would normally not last more than 20 minutes, has the dual purpose of allowing the judge to hear what the child says, and allowing the child to hear the judge explain the nature of the court process; and iv) if the child volunteers evidence that would or might be relevant to the outcome of the proceedings the judge should advise the parties and decide whether and if so how, that evidence would be presented. [73]

3. The Relationship Between the Hague Convention and the UNCRC

In ***A.M.R.I.,*** the Convention refugee case referred to above, the Ontario Court of Appeal specifically referred to Article 12 of the UNCRC in concluding that the child had broad rights to participate:[74]

> Second, art. 12(1) of the CRC stipulates that the view of a child are to be given due weight according to the child's age and maturity and that a child has the right "to express those views freely in all matters affecting the child". Article 12(2) of the CRC confirms this right in the context of "judicial and administrative proceedings affecting the child.

[72] [2010] 2FLR 1872.
[73] Above, note 68 at para 56
[74] Above, note 57 at para. 111.

In ***G.A.G.R. v. T.D.W.,***[75] the B.C. Supreme Court, after citing Article 13 of the ***Hague Convention,*** discussed the importance of Article 12 of the UNCRC to Hague proceedings:

> [47] The concept of giving effect, where appropriate, to the views of a child is consistent with the provisions of the United Nations *Convention on the Rights of the Child* to which Canada is a signatory. Article 12 of that convention provides in part: [Article 12(1) is set out.]
>
> [48] That convention has not been implemented by statute in Canada but is has been ratified and the provincial and federal governments presume that domestic family law respect the rights and values set out in the convention: *B.J.G. v. D.L.G.* 2010 YKSC 44 at para. 5. …

As noted, above, the B.C. Court of Appeal and the Alberta Court of Appeal cited with approval Lady Hale's statement in ***Re M*** that these days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views.

4. Children as Parties to Proceedings

As Bala, Blitt and Blackburn say in their April 4, 2014 commentary, ***The Hague Convention and the Rights of Children,*** appellate courts in Canada and the UK have shown a willingness to recognize the role of children in parental cross-border child abduction cases:[76]

> Recent appellate decisions in the United Kingdom and Canada reveal that courts are increasingly willing to recognize a role for children in *Hague* proceedings, including giving standing to lawyers representing children. The cases also illustrate that involving children in these cases poses significant challenges for judges and counsel, who need to carefully consider not only whether children should participate, but how this should be done.

They describe the evolving approach taken by the United Kingdom Supreme Court:[77]

> In the 2006 House of Lords decision *Re D (A Child)* Lady Hale suggested that "children should be heard far more frequently in... *Hague Convention* cases than has been the practice hitherto….whenever it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which the adult parties are not putting forward, then the child should be separately represented." A year later, Lady Hale continued to advocate hearing from children in some way, such as by having their views put before the court by a court-appointed social worker, but observed that in most

[75] 2013 BCSC 586, Butler J.
[76] Above, note 6, at p. 1.
[77] Above, note 6 at pp. 1-2.

> *Hague* cases "the intrusion, the expense and the delay" should cause a court to be cautious about making a child a party or appoint counsel for the child.
>
> In its 2014 decision in *Re L.C*., the UK Supreme Court demonstrated that there are *Hague* cases, even involving younger children, where their views may play a decisive role and separate representation may be appropriate…
>
> (endnotes omitted)

They suggest some of the factors to consider when deciding whether to add a child as a party or provide legal representation to a child, citing ***L.C***:[78]

- Where there is a reasonable prospect that the child has the capacity to instruct counsel and have an independent position;
- Where the child's position may not be adequately represented to the court by the adult parties, for example because of their lack of legal representation;
- Where a therapist involved with the child recommends such involvement;
- Where the child has expressed concerns that return might affect his or her life, liberty or security of the person.

They also suggest some steps that counsel for a child in a Hague case might take:[79]

- Unless inappropriate, facilitating contact and visits with the left behind parent;
- Retaining a mental health professional to interview the child and testify in court about the child's views, perspectives, concerns and capacities;
- Adducing other evidence and cross-examining witnesses to advance the child's position;
- Discussing with the child and court whether it is appropriate for the child to meet the judge; and
- Making submissions on behalf of the child.

The UK Supreme Court in ***L.C.*** set aside a decision about habitual residence, and added a child as a party. It concluded that the evidence about the child's state of mind in that respect was required; the child had a standpoint incapable of being represented by either of the adult parties.[80] The Court also identified some of the challenges that can be created by the participation of children:[81]

> Intrusion of the child into the forensic arena, which enables a number of them to adopt a directly confrontational stance towards the applicant parent, can prove very damaging to family relationships even in the long term and definitely affects

[78] Above, note 6 at p. 7.
[79] Above, note 6 at p. 7.
[80] Above, note 8, at para. 54.
[81] Above, note 8, at para. 48.

their interests. So does delay in the resolution of the issue whether they should be ordered to return, albeit perhaps only temporarily, to the requesting state.

D. Judicial Communication[82] and Children's Participation

1. Direct Judicial Communication Generally

Direct Judicial Communication arises in cases where there are concurrent proceedings in different jurisdictions with the same parties. It involves communication between judges, with the knowledge of the parties, often in a joint hearing - with the parties and their counsel present - for the purpose of coordinating and harmonizing the proceedings so that a resolution of all the outstanding issues can be reached in a just, timely and cost effective way. The communications do not relate to the merits of each case, and there are safeguards in place to ensure that the processes are fair and do not interfere with the judicial independence of either Court.

In Canada direct judicial communication has been primarily used in cross-border litigation. Rule 86 of the Nova Scotia Supreme Court *Civil Procedure Rules* governs judicial communication in cross-border cases in that province and is found at Appendix A. It is a comprehensive rule that provides for both joint conferences and joint hearings. An educational note to the Rule says it "will be particularly useful in multi-jurisdictional class proceedings under R.68, cross-border insolvency cases, and applications under the *Hague Convention* for the return of abducted children."[83]

The British Columbia Supreme Court has had in place since 2004 guidelines for such communication: *Guidelines Applicable to Court to Court Communication in Cross-Border Cases*.[84] They provide that a Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdictions: Guideline 2. They were developed in the context of bankruptcy and insolvency litigation and used regularly in those cases. They, however, apply to all cross-border cases.

In relation to cross-border child abduction cases, the Canadian Judicial Council, which approved the establishment of the Canadian Network of Contact Judges, gave the Network the mandate to consider the concept of judicial networking and collaboration in cases of child abduction and custody. That Network, chaired by Justice Robyn Diamond of the Manitoba Court of Queen's Bench, developed and approved ***Recommended Practices for Court-to-Court Judicial Communications****,* referred to as Judicial Communications Guidelines, for direct communication between courts. It also developed and approved a step-by-step guide to judicial communication, called

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[82] Note that this section contains excerpts from the more comprehensive look at judicial communication, found in The Honourable Donna Martinson, ***The Canadian* Approach *to Direct Judicial Communication*: *Making Concurrent Proceedings Involving the Same Family Operate Effectively,*** also prepared for the AFCC 2014 Pre-Institute.

[83] Found in the Nova Scotia Barrister's Society Annotated Civil Rules.

[84] See the Court's website at www.courts.gov.bc.ca.

How to Communicate with a Judge in Another Jurisdiction – Canadian Network of Contact Judges Recommendations. The step-by-step guide explains both the Canadian Network of Contact Judges and the International Network of Judges:

1. Network and Liaison Judges

For federally appointed judges, each province and territory has a Network Judge, a judge designated to be responsible for overseeing cross-border child abduction cases. The Network Judge is part of the Canadian Network of Contact Judges. The Canadian Network is chaired by Manitoba Court of Queen's Bench Justice Robyn Diamond.

For provincially appointed judges, there is a similar Network, and many provinces and territories have appointed Network Judges. The Ontario Court of Justice has appointed Network Judges in a number of regions.

Canada also has two international liaison judges who are part of the International Network of Contact Judges. They are responsible for liaising between Canada and other countries. Justice Diamond is responsible for the common law provinces and territories, and Justice Jacques Chamberland, a judge of the Quebec Court of Appeal, is responsible for Quebec.

For further useful information about these Networks, see Justice Diamond's November 2013 article, ***Canadian Judicial Initiatives Respecting the Handling of Inter-Jurisdictional Cases of Child Protection and the International Hague Network of Judges***.[85] Similar work is being done by Provincial Courts.

2. Application to the Participation of Children

I noted in the overview that communication between courts in the two jurisdictions involved, with appropriate safeguards, can help ensure that a child can participate throughout the proceedings in an effective way, with appropriate legal advice. I added that it can also assist in preventing the child from having to repeatedly express his or her views to various judges, at different times, in different jurisdictions. I have said that the issues that relate to children's best interests are different in return applications than they would be if the court were determining, in a custody hearing, a child's long term best interests. However, methods of obtaining children's views, and the way in which they will be presented to the court, can be managed by judicial communication. Children's views will be relevant to efforts to reach a consensual resolution at a judicial communication case management conference. They may be relevant, if a return is being considered, to the kinds of undertakings parents can give that will be effective in each jurisdiction, and to the making of identical orders in each jurisdiction to ensure enforcement (mirror orders).

Meeting the Challenges – Where Do We Go from Here?

[85] The International Family Law Journal, 2013 IFL 307-317.

Many important questions relating to children's participation arise in cross-border parental child abduction cases. Among them are issues concerning: how judges balance children's rights to have a significant say in proceedings that affect them, including return application proceedings, with the desire to ensure the prompt return of abducted children to their place of habitual residence; how a child will be represented; how judges determine the views of a child; how judges assess whether a child is mature enough to have his or her views considered; and how judges assess whether the views of a child are genuine, or based on alienating conduct by the abducting parent. Finding answers to these questions requires the legal profession to find creative and principled ways forward which result in the hearing of and deciding of return applications in a just, timely, cost effective way that provides for meaningful participation in the process by children.