

**REPORT on HAGUE CONVENTIONS:
PROTECTION OF ADULTS AND PROTECTION OF CHILDREN**

Toronto, Ontario
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I - Introduction

A - Request to the ULCC

[1] In August 2000, the Department of Justice proposed that the ULCC establish a working group to prepare Uniform Acts for the implementation of both the 1999 Hague Convention on the International Protection of Adults (hereinafter the 1999 Convention on the Protection of Adults) and the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (hereinafter the 1996 Convention on the Protection of Children).

[2] The Working Group was led by Manon Dostie, Counsel to the Private International Law Team of the Department of Justice of Canada. The Group worked through electronic mail and met by conference calls held on February 14, March 7 and 14, April 4 and 24, May 14 and June 6 and 26, 2001. Legislative drafters participated in most of the conference calls and met separately with Manon Dostie to discuss their drafting instructions. All documents were produced in both official languages throughout the process.

B - Mandate of the Working Group

[3] The mandate of the Working Group was to draft in both official

languages one or two Uniform Acts to implement the 1999 Convention on the Protection of Adults and the 1996 Convention on the Protection of Children and was to present the Act or Acts at the ULCC's August 2001 Annual Meeting for discussion and adoption. The Working Group was to decide if one or two implementing Acts were more appropriate. The instructions given to the Working Group to draft this Uniform Act or Acts included providing comments or explanations for each provision of the Act or Acts and also preparing a Working Group Report. The Report was to describe the Conventions, the methodology to be followed to implement them, including an assessment of the declarations and options allowed under the terms of the Conventions and recommendations as to the options available to Canada under both Conventions at the time of ratification.

II - Overview of the Conventions A - Historical Background

1996 Convention on the Protection of Children

[4] This Convention originated in the Decision taken on 29 May 1993 by the States represented at the Seventeenth Session of the Hague Conference on Private International Law to include in the Agenda of the Eighteenth Session the revision of the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors and a possible extension of the new Convention's scope to the protection of incapacitated adults.

[5] Three Special Commissions were held to discuss the issues related to children, from 26 May to 3 June 1994, then from 6-17 February 1995 and finally from 11-22 September 1995. The Hague Convention on jurisdiction, applicable law, recognition and enforcement and co-operation in respect

of parental responsibility and measures for the protection of children was adopted unanimously by the Member States present at the Diplomatic Session of 18 October 1996.

1999 Convention on the Protection of Adults

[6] The origin of the Convention on the International Protection of Adults goes back to the Decision taken on 29 May 1993.

[7] The Eighteenth Session of the Conference had only carried out half of this programme by drawing up the Hague Convention on the Protection of Children, but it lacked the time to examine closely the case of adults. Also, having noted that the work on a convention on the protection of adults should be pursued following the adoption of what has become the Convention of 19 October 1996, and having considered "that one or more subsequent meetings of a Special Commission would be likely to lead to the adoption of a convention on the protection of adults", it instituted for that purpose a Special Commission and decided "that the draft Convention to be drawn up by a Special Commission of a diplomatic character shall be embodied in a Final Act to be submitted for signature by the Delegates participating in such Commission".

[8] A small drafting committee, which met in The Hague on 13 and 14 June 1997, drafted a first outline text to provide a basis for the work of the Special Commission held from 3 to 12 September 1997. The Special Diplomatic Commission met in The Hague from 20 September to 2 October 1999 and unanimously adopted the Hague Convention on the International Protection of Adults. During the Diplomatic Commission, the Canadian delegation participated in the drafting Committee, the federal clauses committee and the model forms committee.

B - The Project and its Contexts

General Thrust and Principal Features of the Project

[9] These Conventions create global legal solutions to address the problems raised by the increase in the transborder movement of children and adults in need of protection.

[10] More specifically, the 1996 Hague Convention on the Protection of Children deals with the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation; rights of custody; guardianship, curatorship and analogous institutions; the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; the placement of the child in a foster family or in institutional care; the supervision by a public authority of the care of a child by any person having charge of the child; and the administration, conservation or disposal of the child's property.

[11] Modelled after the 1996 Convention, the 1999 Convention on the International Protection of Adults provides for the protection of those adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their person or their property. This Convention deals in particular with the determination of incapacity and the institution of a protective regime; the placing of the adult under the protection of a judicial or administrative authority; guardianship, curatorship and analogous institutions; the designation and functions of any person or body having charge of the adult's person or property, representing or assisting the adult; the placement of the adult in an establishment or other place where protection can be provided; the administration, conservation or disposal of the adult's property; and the authorisation of a specific intervention for the protection of the person or property of the adult.

C - The Framework and Texts of the Conventions

(a) 1996 Convention on the Protection of Children

[12] The new Convention now comprises sixty-three articles divided into seven chapters. The title of the Convention reflects closely the contents of the text.

Chapter I : Scope of the Convention/ Articles 1 to 4

[13] Chapter I includes four provisions: Article 1 on the objects of the Convention, Article 2 on the scope of application of the Convention to children under 18 years of age, Articles 3 and 4 on the scope of material application of the Convention, i.e. measures included in and excluded from the Convention. The scope of application is illustrative instead of enumerative.

[14] The Convention applies to children from the moment of their birth until they reach the age of 18.

[15] Parental responsibility is defined as including parental authority or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child. In Canada, the term "parental responsibility" does not exist as such. In Quebec, however, Article 600 of Book 2, Title IV of the Civil Code of Quebec refers to parental authority. In each province and territory, rights, powers and responsibilities of parents and guardians are determined by the relevant legislation. It is implied in Canada that the existence of "parental responsibility" towards a child is determined by the law of the province or territory in which the child has his or her habitual residence or is presumed to have his or her habitual residence in accordance with local

law.

[16] The measures directed to the protection of the person or property of the child may deal in particular with

a the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;

b rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;

c guardianship, curatorship and analogous institutions;

d the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;

e the placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution;

f the supervision by a public authority of the care of a child by any person having charge of the child;

g the administration, conservation or disposal of the child's property.

[17] However, the establishment or contesting of a parent-child relationship; decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption; the name and forenames of the child; emancipation; maintenance obligations; trusts or succession; social security; public measures of a general nature in matters of education or

health; measures taken as a result of penal offences committed by children; and decisions on the right of asylum and on immigration are excluded from the Convention.

Chapter II: Jurisdiction/ Articles 5 to 14

[18] Chapter II contains ten provisions, Articles 5 to 14, which are fundamental to the application of the Convention as they determine the bases of jurisdiction of the authorities concerned with the protection of children in the Contracting States.

[19] As stated in Article 5, the primary basis of jurisdiction is the State of the child's habitual residence. This rule is consistent with provincial and territorial legislation on custody and access. There may be exceptions if the parents consent or if it is the child's at risk of harm.

[20] Refugee and internationally displaced children are considered to have their habitual residence in the State where they are located (Article 6).

[21] In circumstances other than wrongful removal, a change in the habitual residence will also imply that the authorities of the new State of habitual residence will then have jurisdiction (Paragraph 5(2)).

[22] However, as set out in Article 7, in case of wrongful removal, outside the application of the Hague International Child Abduction (see Article 50), the authorities of the State of the habitual residence at the time of the removal remain competent until it is considered that the child has acquired a new habitual residence and the conditions described in Article 7 have been fulfilled. Once the change in habitual residence can be established, the authorities of the State of new habitual residence take jurisdiction. In the meantime, their jurisdiction is limited to emergency measures.

[23] Jurisdiction may be transferred between authorities taking jurisdiction on grounds provided in the Convention (Articles 8 and 9). The primary competent authorities, i.e. that of the State of habitual residence, may transfer their jurisdiction to authorities of other States, namely the State of the child's nationality, the State of the location of the property, the State of the divorce application or the State with which the child has a substantial connection, if they were to be in a better position to assess the best interests of the child. Authorities of those other States may take jurisdiction for the same reasons after having requested to that end the authorities of the State of the child's habitual residence if those authorities have accepted the request.

[24] Article 10 concerns the recognition of a concurrent basis of jurisdiction upon an application for divorce or legal separation of the parents of a child or for annulment of their marriage.

[25] According to the Convention, at the time a divorce action (or separation or annulment) instituted in Canada,⁽¹⁾ the competent judge under Canadian rules can take measures directed to the protection of the person (ie. custody or access) or property of the child if one of the parents has his or her habitual residence in Canada (i.e., a province or territory) and if one or the other parent has parental responsibility over the children: see Sub-paragraph 10(1)a). In this case, a Canadian judge will be competent to grant such measures (ie. custody and access) if the jurisdiction has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child: see Sub-paragraph 10(1)b).

[26] However, the authorities of the divorce can only exercise jurisdiction over the protection of the child in very strict conditions and for a limited time period until the divorce has become final.

[27] Articles 11 and 12 provide for other bases of jurisdiction in exceptional circumstances such as urgency and temporary presence of the child. Additional paragraphs deal specifically with the duration of measures taken on such grounds for children residing in either Contracting or non-Contracting States.

[28] Article 13 was added to solve problems resulting from the exercise of jurisdiction by more than one competent authority in accordance with Articles 5 to 10 in order to avoid conflicting orders.

[29] Finally, Article 14 deals with the duration of the measures taken in accordance with Articles 5 to 10 without any change.

Chapter III: Law applicable/ Articles 15 to 22

[30] Chapter III now contains eight provisions instead of three. Articles 15 and 16 deal with rules relevant to the determination of the law to be applied to decisions affecting the protection of the child's person or property, either as a result of the taking of measures by competent authorities or as part of the exercise of parental responsibility. Articles 17 and 18 provide supplementary rules for the exercise of parental responsibility which were formerly part of one single provision. Article 19 relates to the validity of a transaction concluded in good faith by third parties with legal representatives of the child.

[31] Articles 20 and 21 are modelled on similar rules found in other conventions on the law applicable to assist in the interpretation of the word "law" used in the Chapter on Law Applicable. Article 22 refers to public policy.

Chapter IV: Recognition and Enforcement/ Articles 23 to 28

[32] Chapter IV comprises six provisions to deal with the recognition and enforcement, in other Contracting States, of measures falling under the scope of the Convention which have been taken in one Contracting State.

[33] Article 23 reiterates the rule of "automatic" recognition unless one of the exceptions to recognition applies. Article 24 refers to the possibility of obtaining in the recognition State upon request a declaratory judgment, or the like, on whether the measure is or is not recognized. Article 25 deals with the proceedings of enforcement by referring to the law of the requested, i.e. enforcing, State only in the case of measures requiring such an enforcement. Article 26 imposes some limits on the jurisdiction of the recognition and enforcement authorities.

[34] Finally, Article 26 deals with the actual enforcement of the measures which is effected according to the means of enforcement existing in the requested State as if they had been taken in that State. The law of the requested State may establish certain limits to the means of enforcement.

Chapter V: Co-operation/ Articles 29 to 39

[35] Chapter V comprises ten articles. This chapter is aimed at providing a meaningful framework for inter-State cooperation under the Convention. To that end, as stated in Article 29, Contracting States are required to designate a Central Authority. Federal States are enabled to appoint more than one Central Authority. Article 30 identifies the general duties of the Central Authorities. Article 31 lists their specific functions, namely, providing assistance in the exchange of communications and requests and also in locating the child, as well as facilitating agreed solutions for the protection of the child.

[36] Article 32 provides for the possibility of requesting concerned authorities to prepare a report on the situation of the child or to

consider the taking of measures for the protection of the child. Article 33 requires that in the case of a proposed placement of a child in need of protection in another State, authorities of that State be consulted and also agree to the placement.

[37] Article 34 deals with requests for information by competent authorities. The Contracting State may declare that all such requests must be communicated through its Central Authority.

[38] Article 35 deals with requests for assistance in the implementation of measures, especially those aimed at the exercise of access rights. An operational framework of cooperation between authorities dealing with applications concerning access is provided. In other words, the court of the State of the non-custodial parent could be asked to provide information to the court of the State that has jurisdiction to take measures concerning access. The latter court would then consider to adjourn a proceeding pending the outcome of its request for information.

[39] Article 36 refers to the duty to inform in case of a change of the child's residence to or his or her temporary presence in another State. Article 37 provides for the possibility not to request or to refuse to transmit information in specific situations of danger for the child or his or her family. The reference to those situations has been reworded so as to enlarge the scope of protection.

[40] Finally, Article 38 provides that each authority will bear its own costs but will not be prevented from establishing a cost-recovery system. States will be allowed to enter into agreements to provide for the allocation of charges. Article 39 enables States to conclude agreements to facilitate the application of the Chapter on Cooperation.

Chapter VI: General provisions/ Articles 40 to 56

[41] This Chapter contains interpretative provisions for the application of the Convention in the context of federal and other types of non-unitary States, provisions on the relationship between this Convention and other Conventions and the possibility of a reservation for the application of the Convention to property.

[42] Article 40 deals with delivery of a certificate to the child's representative by authorities designated to that end. Articles 41 and 42 refer to the use of information gathered or transmitted under the Convention and confidentiality safeguards. Article 43 provides for an exemption from legalization requirements, i.e. authentication by diplomatic officials, of all documents forwarded or delivered under the Convention.

[43] Articles 44 and 45 deal with the designation of authorities to which requests under the Convention should be addressed and the transmission of such information through appropriate channels.

[44] Articles 46 to 49 contain rules of interpretation in the context of federal and other types of non-unitary States modelled on similar provisions of other Hague Conventions. For instance, Article 47 provides such rules in relation to measures taken under the Convention while Articles 48 and 49 do so in relation to the law applicable.

[45] Article 50 establishes the prevalence of the Hague Convention on the Civil Aspects of International Child Abduction over the new Convention. Article 51 indicates that the new Convention replaces both the 19021 and 1961 Hague Conventions on the Protection of Minors. Article 52 speaks of the relationship of the new Convention with other existing conventions as well as with future conventions on matters governed by the new

Convention.

[46] Article 53 determines that the Convention will apply to measures taken after the Convention comes into force and also provides a special rule for the recognition and enforcement of such measures. Article 54 indicates in which language communications between authorities under the Convention will be transmitted. It also allows for a reservation on this matter. Article 55 provides for the possibility of a reservation regarding the application of the Convention to property matter.

[47] Finally, Article 56 refers to future special commissions to review the operation of the Convention.

Chapter VII: Final Clauses/ Articles 57 to 63

[48] The last Chapter of the Convention provides for usual treaty rules of a technical nature to deal with the signature and ratification of the Convention, the time for making reservations, the entry into force of the Convention, its denunciation, as well as notifications to the depositary of the Convention. Of particular importance to Canada, Article 59 will enable Canada to ratify the Convention and extend it on a jurisdiction-by-jurisdiction basis.

(b) Hague Convention on the International Protection of Adults

[49] This is the first time that a Convention creates global legal solutions to address the problems raised by the ageing of the population and the increase in transborder movements of adults in need of protection. Its purpose is to provide for the protection of those adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their person or their property.

[50] The new Convention is composed of 59 articles divided into seven chapters, reflecting the chapters of the Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children.

Chapter I: Scope of the Convention / Articles 1 to 4

[51] This chapter closely follows Chapter I of the 1996 Convention on the Protection of Children. These provisions aim at identifying the legal questions to be resolved by the rules of the Convention (Article 1); at presenting a definition of the word "adult" based on age (Article 2); at specifying the material scope with a list of included matters (Article 3) and excluded matters (Article 4).

[52] Two factual elements will determine the application of the Convention to a particular adult. First, the adult must have "an impairment or insufficiency of his or her personal faculties" and secondly, this "impairment or insufficiency" must result in the adult's inability to protect his or her interests.

[53] Both judicial and administrative authorities, such as guardians and curators, have jurisdiction to take measures directed to the protection of the person or the property of the adult.

[54] The Convention applies to measures in respect of an adult who is of the age of 18 or older as well as to an adult who had not reached the age of 18 years at the time the measures were taken.

[55] Sub-paragraphs 4(1)(b) and (c) excluded the application of the Convention to "marriage, annulment, legal separation and divorce" and "matrimonial property regimes". These sub-paragraphs were amended to

allow for exclusions to "similar relationships to marriage." Such matters are excluded because they are already regulated by other Conventions from The Hague Conference on Private International Law or because they are a matter of public law covering essential interests of the State such as criminal law.

[56] Sub-paragraphs 4(1)(g) and (i) state that the placement of an adult does not include police detention. Further, measures directed solely to public safety are to be excluded from the Convention.

[57] Paragraph 4(2) clarifies that the exclusions under paragraph 4(1) do not affect the entitlement of a person to act as the representative of the adult.

Chapter II: Jurisdiction / Articles 5 to 12

[58] This Chapter contains important rules for determining the jurisdiction of State authorities, either judicial or administrative, to take measures for the protection of the adult's person or property. As a result, potential conflict of jurisdiction between two or more countries interested in the care of the adult will be prevented. Problems such as the multiplicity of proceedings, delays and costs will be reduced. The text of this Chapter is modelled on Chapter II of the 1996 Convention on the Protection of Children, but with notable changes.

[59] The primary jurisdiction is given to the authorities of the State of the adult's habitual residence (Article 5). A special rule to determine an alternative habitual residence is provided for adults that are either refugees or internationally displaced (Article 6).

[60] Jurisdiction based on nationality can be considered as a subsidiary concurrent jurisdiction to the one based on habitual residence if they are

in a better position to assess the interests of the adult and after advising the authorities under Article 5 or Paragraph 6(2) as specified in Article 7. This jurisdiction was not included in the 1996 Convention on the Protection of Children because disputes are more often between parents in the midst of a custody battle for children than between two people wanting to assume the protection of the adult. This allows a larger number of people to assume the protection of the adult.

[61] Although the use of "nationality" as a concurrent subsidiary jurisdiction is rare in international law conventions, concerns regarding the use of nationality as a basis for jurisdiction are diluted by the criteria of "if they consider that they are in a better position to assess the interests of the adult". This same criteria will be applied in situations where the adult has dual nationality. Further, those authorities of a Contracting State of which the adult is a national must advise the authorities having jurisdiction under Article 5, paragraph 6(2) or Article 8.

[62] The authorities of the habitual residence can transfer their jurisdiction to a more appropriate forum (Article 8). Two appropriate fora were added in the final Convention. The authorities of the habitual residence can transfer their jurisdiction to the jurisdiction of "persons close to the adult prepared to undertake the protection of the adult". The draft Convention limited the transfer of jurisdiction to one where relatives were prepared to undertake his or her protection. A further amendment provides that an appropriate forum could also be the State in whose territory the adult is present, with regard to the protection of the person of the adult.

[63] Jurisdiction related to the property location is limited (Article 9) as well as the jurisdiction in case of urgency (Article 10). Article 10 now provides that the authorities that have taken measures under paragraph 1(1) will, if possible, inform the authorities of the Contracting State of the habitual

residence of the adult of the measures taken.

[64] The authorities of a Contracting State in whose territory the adult is present will have jurisdiction to take temporary measures (Article 11). Finally, the duration of measures decided by a competent authority on the basis of Article 5, 7, 8 or 9 is indicated (Article 12).

Chapter III: Applicable Law / Articles 13 to 21

[65] This Chapter is modelled on Chapter III of the 1996 Convention on the Protection of Children without a reference, for obvious reasons, to the concept of parental responsibility. However, this concept is to some extent replaced here in the context of adult protection by the concept of powers of attorney. The novelty of the issue of the law applicable to powers of attorney in an international context raised interesting discussions amongst the delegates. As many countries are not familiar with powers of representation, Canada's experience with powers of representation⁽²⁾, both in civil law and in common law was helpful in providing concrete examples and explanations of the use and functioning of powers of representation.

[66] On the one hand, it establishes that competent authorities should apply their own law (Article 13). However, the implementation of measures will be governed by the State in which the conditions will be implemented (Article 14). On the other hand, it provides in the case of powers of attorney that the applicable law will be that of the adult's habitual residence in the absence of an express choice of law. The choice is limited to a small number of alternatives. However, the manner of exercise of such powers of representation is governed by the law of the State in which they are exercised (Article 15). The text also provides for modification or withdrawal to powers of attorney if the power of attorney is not exercised in a manner sufficient to guarantee the protection of the

person or property of the adult. However, in modifying or withdrawing the power of attorney, the applicable law under Article 15 should be considered to the extent possible (Article 16). In addition, a rule is provided to ensure the validity of transactions concluded with the adult's representative (Article 17). Finally, the text contains a number of rules on the interpretation and application of the applicable law (Articles 18 to 21).

Chapter IV: Recognition and Enforcement/ Articles 22 to 27

[67] This Chapter, which is closely modelled on Chapter IV of the 1996 Hague Convention on the Protection of Children, establishes conditions for the recognition and enforcement of orders taken for the adult's protection. Its main goal is to provide rules that will facilitate the legal recognition in other countries of measures ordered in a particular State (such as guardianship) and their actual enforcement if necessary (such as the sale of an immovable). Apart from solutions already found in "old" treaties, which are limited to a number of States, rules on recognition and enforcement are for the most part left up to the internal law of each State. The future Convention would thus represent an important step in the execution of orders for the protection of adults decided in countries that will be party to it.

[68] Legal recognition of measures taken in accordance with the future Convention will be ensured, provided no exception to recognition applies (Article 22). A new exception was added to Article 22: if recognition is manifestly contrary to public policy of the requested State, or conflicts with a provision of the law of that State which is mandatory whatever law would otherwise be applicable, then the measures taken by the authorities of a Contracting State will not be recognised.

[69] Declaratory judgements on the recognition of a particular measure can be requested (Article 23). Findings of fact on which the decision was

made are binding (Article 24) while the decision cannot be reviewed on the merits (Article 26). Enforcement proceedings shall be made in accordance with the procedural law of the State in which enforcement is sought (Article 25). The actual execution is governed by the law of the requested State (Article 27).

Chapter V: Co-operation/ Articles 28 to 37

[70] This chapter provides rules on a very important aspect of the international protection of adults - the framework of cooperation between authorities of various countries that will be party to the future Convention. It draws inspiration from its equivalent, Chapter V, in the 1996 Convention on the Protection of Children.

[71] In essence, the cooperation system will rely on Central Authorities designated in each State (more than one can be designated in federal States such as Canada, i.e. at the federal, provincial and territorial levels (Article 28). Those authorities will be the focal contact point for the general application of the future Convention (Article 29). They will also perform themselves some particular functions or have them delegated (Article 30). Article 30 was slightly modified to encourage Central Authorities to communicate "by every means" thereby allowing for the use and evolution of communication technology.

[72] The use of mediation, conciliation or similar means to settle disputes is encouraged to achieve agreed solutions for the protection of the adult or property (Article 31). As some States were concerned that the previous wording "shall take steps to facilitate...." would create obligations they might be unable to fulfil. The wording was replaced with "shall encourage...".

[73] Most often, cooperation in individual cases will be done between

competent authorities in each State, such as Public Trustees, Curateurs publics, or the courts. To that end, competent authorities will be authorized to exchange information (Article 32). They will also have the duty to consult and to respond to the consultation when the placement of an adult in another State is contemplated (Article 33).

[74] Should an adult face serious risks, authorities will have to provide this information to other competent authorities (Article 34). Some limits will be imposed on requests for information (Article 35).

[75] Finally, Chapter V also deals with the financial aspects of cooperation between the Central and the competent authorities. Those authorities will bear their own costs (Article 36). However, agreements could be concluded State-to-State to share costs (Article 37).

Chapter VI: General provisions / Articles 38 to 52

[76] This Chapter, which corresponds to Chapter VI of the 1996 Convention on the Protection of Children, but with some modifications, contains provisions on various matters.

[77] Currently, Chapter VI provides rules on the following questions: issuance of a certificate for the adult's representative or confirmation a power of representation (Article 38); duty to protect and ensure confidentiality of personal data (Articles 39 and 40); exemption from legalisation (Article 41) and designation of authorities (Articles 42 and 43).

[78] During the Diplomatic Conference, a Committee on federal state clauses⁽³⁾ examined the issue and its proposals were submitted to the conference. Canada participated in the special Committee on federal clauses.

[79] The articles adopted (Articles 44 to 47) are very similar to the ones found in the 1996 Convention on the Protection of Children. They contain rules of interpretation in the context of federal and other types of non-unitary States. For example, under Article 45 in the context of jurisdiction, the term "Contracting State" must be understood as meaning "territorial unit of the Contracting State" and "habitual residence" must be understood as meaning "habitual residence in a territorial unit of the Contracting State" and so on.

[80] Rules for conflicts between Conventions (Articles 48 and 49), application of the Convention to orders made its entry into force by the State (Article 50), languages to be used for communications (Article 51), and convocation of future Special Commissions to review the practical operation of the Convention (Article 52) are also included in this chapter.

Chapter VII: Final Clauses/ Articles 53 to 59

[81] The final clauses are always drafted at the Special Commission with diplomatic character. Articles 53 to 59 deal with formalities of signature, ratification, acceptance, approval, accession; entry into force of the Convention and set out the notifications to the depositary of the Convention regarding future accessions. The final clauses found in this Convention are consistent with the ones from the 1996 Convention on the Protection of Children.

[82] The federal State clause found in Article 55 allows the application of the Convention to be extended to territorial units on a case by case basis as they wish to implement it. This provides much needed flexibility to States with more than one territorial unit.

III - Canadian Accession and Implementation

A - Ongoing Consultations with regard to the Negotiations

[83] Canada actively participated in all stages of the development of both Conventions. Provincial, territorial and private interests were consulted since its inception and throughout the process.

[84] In preparation for Special Commissions, consultations were once again undertaken by the federal government with provincial and territorial authorities responsible for the protection of adults and children, relevant federal departments, legal experts and interested non-governmental organisations.

[85] The comments received from those consulted with provided insight and guidance to the Canadian delegation in its negotiations at The Hague. In addition, the need for Conventions to provide rules for jurisdiction, applicable law, recognition, enforcement and cooperation in matters related to the protection of children and adults due to the increase in the transborder movement of adults and global demographic changes.

B - Consultation on Canadian Accession and Implementation

[86] Consultation with provinces and territories regarding Canada's signature and ratification of the Conventions will take place in the coming year.

C - Form of Implementation: Separate Implementation Act for Each Convention

1 - Separate Legislation Implementing the Conventions

[87] The Working Group decided that although similar, each Convention should be implemented separately as they target different groups of

society with different considerations.

[88] The Working Group concluded that there is no need for federal implementation of the Conventions as the substance of the Conventions are within provincial and territorial jurisdiction.

2 - Consequential Amendments

(a) - Federal

[89] In 2001, the federal, provincial and territorial governments initiated a collaborative consultation process on custody, access and child support issues that affect children and families in instances of separation and divorce. Depending on the results of these consultations action may be needed in the future.

(b) - Provincial and territorial

[90] The Working Group decided not to include any consequential amendments in the Uniform Acts. However, each jurisdiction that wishes to implement a Convention should revise all its domestic legislation including the privacy and property laws for consistency with the rules of the Conventions.

D - Implementation Methods used in Canada

[91] Generally, there are three methods, or options, by which international treaties are implemented in Canada. (cf. Verdon, Christiane, «Le Canada et l'unification internationale du droit privé», (1994) 32 C. Yrbk. Int'l L., pp. 3-37, at p. 30; and, Brownlie, Ian, Principles of Public International Law, 2nd ed., Clarendon Press, Oxford, 1973, 733 p., at p. 50).

[92] Option (1) - The treaty can be incorporated in a short Act which expressly gives the force of law to the treaty or certain of its articles. Then the treaty or such articles may be set out as a schedule to the Act (e.g. The Act implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, C.S. c. U-2.4 and, the Foreign Missions and International Organisations Act, C.S.C., c. F-29.4, C.S. (1991), c. 41).

[93] Option (2) - The treaty may be implemented by an Act which may employ its own substantive provisions to give effect to the treaty, the text of which is not directly enacted or referred to (e.g. Sub-section 7(2.2) of the Criminal Code i.e., the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988).

[94] Option (3) - Even where the treaty is referred to in the long and short titles of the Act and also in the preamble and schedule for dissemination purposes, the Act may not expressly give the force of law to the treaty. Rather, contents of the provisions will allow the enforcement of the treaty in domestic law as is necessary to comply with the obligations imposed on the State without expressly giving the force of law to the treaty as under Option (1). However, the provisions of the Act implement the treaty in domestic law (e.g. NAFTA).

[95] The Working Group discussed the possibilities and opted for the simpler method under Option (1). This method has frequently been used to implement conventions in the past and would ensure a more consistent implementation throughout Canada than Option (2).

E - Implementation Principles Followed

[96] The following implementation principles were followed by the

Working Group:

[97] i) Implementation principles from Professor Hugh Kindred (cf. Kindred, Hugh M., et al., *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed., Toronto, Edmond Montgomery, 1993, at 147-48) :

"[T]o what extent may international legal principles be relied upon as imposing legally enforceable obligations, or conferring legally enforceable rights, on individuals that they may use in their domestic system? This question is, in some contexts, referred to as the "direct applicability" or "direct effect" of international law in the domestic legal system. [...] In Canada, [...] [a] good argument may be made [...] that Canada is adoptionist in respect of customary international law and transformationist in respect of conventional law - the latter clearly springing from following the British legal tradition that treaties must be enacted into law by Parliament before they will affect private rights."

"Implementation is the process of giving effect to a treaty within the national legal system. In Canada, the vast majority of treaties have to be implemented by legislation. This requirement is the result of the constitutional separation of powers. Although the executive in exercise of the royal prerogative may conclude a treaty, it cannot make law. That is the responsibility of the legislature. As a result, a treaty made by the federal government will bind Canada as a country, but its provisions do not affect internal law until they have been implemented by legislation. [...] [J]urisdiction to adopt laws for the purpose of implementing treaties is determined by the ordinary rules governing the division of legislative powers under the constitution."

[98] ii) Implementation principles from Professor Ian Brownlie (cf. Brownlie, Ian, *Principles of Public International Law*, 4th ed., Clarendon

Press, Oxford, 1990, at pp. 47-48) :

"It is only in so far as the rules of International Law are recognised as included in the rules of municipal law that they are allowed in municipal courts to give rise to rights and obligations. [...] [I]nternational law has no validity save in so far as its principles are accepted and adopted by our own domestic law."

F - Implementation Analysis of the Convention

1 - Texts set out in the schedules to the Act

[99] The Working Group agreed that the texts of the Conventions would be appearing in the schedules to the Act.

2 - General implementation comments

[100] The Working Group suggested making as few declarations as possible in order to make the application of the Convention as simple and uniform as possible.

[101] It should also be noted that the Adults' Convention does not a reservation on property as does the Children's Convention (Article 55). The Working Group suggests that jurisdictions may want to avoid or at least limit the effect of this reservation as to make it more consistent with the Adults' Convention.

1 Implementation Analysis of the Declarations and Reservations

(i) 1996 Convention on the Protection of Children

(c) Article 29 of the Convention - Designation of a Central Authority

[102] Under this Article, each Contracting State must designate a Central Authority to discharge the obligations of the Convention. As Canada is a federal state, a Central Authority must be designated by each province or territory to which the Convention extends as well as a federal Central Authority. The role of the Central Authority to be designated under the Convention by each province or territory is the key to much of the practical operation of the Convention. Its duties are not described in detail in this uniform Act, because they are set out in the Convention itself. The co-ordinates for the central authorities designated under this Convention can found on the Hague Conference web site at <http://www.hcch.net> .

(b) Article 34 of the Convention - Communication through Central Authority

[103] Where a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the child so requires, may request any authority of another Contracting State which has information relevant to the protection of the adult to communicate such information.

[104] A Contracting State may declare that requests under paragraph 1 of Article 34 shall be communicated to its authorities only through its Central Authority.

(c) Article 54 of the Convention - language

[105] Any communication sent to the provincial, territorial or federal Central Authority or to another authority of a Contracting State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the other State or, where that is not feasible, a translation into French or English.

[106] However, a Contracting State may, by making a reservation in accordance with Article 56, object to the use of either French or English, but not both.

(d) Article 55 of the Convention - property

[107] Each jurisdiction will have to decide if it will

(a) reserve the jurisdiction of its authorities to take measures directed to the protection of the property of a child situated in its territory, or

(b) reserve the right not to recognize any parental responsibility or measure in so far as it is incompatible with any measure taken by its authorities in relation to that property.

[108] Each jurisdiction will have to decide if it further wants to restrict this reservation to certain categories of property.

[109] The Members of the Working Group agreed that jurisdictions should avoid restricting the application of the Convention. They further noted that this reservation is not present in the Adults' Convention.

(e) Article 59 of the Convention - Extension of Convention to province/territory

[110] At the time of signature and ratification, Canada may declare that the Convention shall only extend to those provinces or territories that have implemented the Convention and have asked the federal government to extend the application of the Convention to their territory.

[111] Further to a request from a province or territory, Canada may, at a

later date, modify this declaration by submitting another declaration at any time.

(ii) Adults' Convention

(a) article 28 of the Convention - Designation of a Central Authority

[112] Under this Article, each Contracting State must designate a Central Authority to discharge the obligations of the Convention. As Canada is a federal state, a Central Authority must be designated by each province or territory to which the Convention extends as well as a federal Central Authority. The role of the Central Authority to be designated under the Convention by each province or territory is the key to much of the practical operation of the Convention. Its duties are not described in detail in this uniform Act, because they are set out in the Convention itself. The co-ordinates for the central authorities designated under this Convention can found on the Hague Conference web site at <http://www.hcch.net> .

(b) article 32 of the Convention - Communication through Central Authority

[113] Where a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the adult so requires, may request any authority of another Contracting State which has information relevant to the protection of the adult to communicate such information.

[114] A Contracting State may declare that requests under paragraph 1 of Article 32 shall be communicated to its authorities only through its Central Authority.

(c) article 51 of the Convention - language

[115] Any communication sent to the provincial, territorial or federal Central Authority or to another authority of a Contracting State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the other State or, where that is not feasible, a translation into French or English.

[116] However, a Contracting State may, by making a reservation in accordance with Article 56, object to the use of either French or English, but not both.

(d) article 55 of the Convention - Extension of Convention to province/territory

[117] At the time of signature and ratification, Canada may declare that the Convention shall only extend to those provinces or territories that have implemented the Convention and have asked the federal government to extend the application of the Convention to their territory.

[118] Further to a request from a province or territory, Canada may, at a later date, modify this declaration by submitting another declaration at any time.

2 Interpretation

[119] The Working Group decided not to include supplementary interpretation provisions as treaty interpretation principles found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, Can. T.S. 1980 No. 37, have been recognized as part of Canadian law by recent court decisions. In *Thomson v. Thomson* [1994], 3 S.C.R. 551, at pp. 577-578, Justice La Forest wrote "[i]t 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) v. Ward, [1993] 2 S.C.R. 689".

3 Ratification

[120] It is necessary to provide when the Convention will have the force of law for the enacting jurisdiction. Under the Uniform Act, the Convention and its regulations will have force of law only when the Convention comes into force for the jurisdiction, that is, the first day of the month following the expiry of three months after it deposits the instruments of ratification. Jurisdictions that enact the Act after Canada is a party will have the Convention apply to them following a similar period after Canada notifies the depositary of the Convention (the Ministry of Foreign Affairs of the Netherlands).

G - Miscellaneous Issues

1 - Address of Hague Conference and website

[121] <http://www.hcch.net>

2 - Other useful documents

[122] The text of the Conventions and their Explanatory Reports are available on the Hague web site at: www.hcch.net.

Children's Convention

Clive, E. - The role of the new Protection of Children Convention; Globalization of Child Law - the role of the Hague Conventions (S. Detrick & P. Vlaardingerbroek, eds.), Kluwer Law International 1999, p. 53.

Dehart, G.F. - Introductory Note: Hague Convention on the Protection of Children; International Legal Materials, Vol. XXXV, No. 6, November 1996, p. 1391.

Detrick, S. - Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; Hague Yearbook of International Law, 1996, p. 77.

Iterson, D. - The Adoption of a New Hague Convention on the Protection of Children: A View from the Netherlands; Uniform Law Review/Revue de droit uniforme, 1997, No. 3, p. 474 (avec résumé en français).

Lagarde, P. - La nouvelle Convention de La Haye sur la protection des mineurs; Revue critique de droit international privé, 1997, No. 2, p. 217.

Nygh, P.E. - The New Hague Convention on Child Protection; Australian Journal of Family Law, Vol. 11, 1997, p. 5.

Silberman, L. - The 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children: A Perspective from the United States; Private Law in the International Arena. From National Conflict Rules Towards Harmonization and Unification. Liber Amicorum Kurt Siehr, T.M.C. Asser Press, The Hague 2000, p. 703.

Adults' Convention:

Dehart, G.F. - Introductory Note to the draft Hague Convention on the International Protection of Adults; International Legal Materials, Vol. XXXIX, January 2000, p. 4.

Lagarde, P. - La Convention de La Haye du 13 janvier 2000 sur la protection internationale des adultes; Revue critique de droit international privé, 2000, No. 2, p. 159.

Lortie, Ph. - La Convention de La Haye du 2 octobre 1999 sur la protection internationale des adultes; International Law FORUM du droit international, 2000, No. 1, p. 14.

Mostermans, P.M.M. - A New Hague Convention on the International Protection of Adults; International Law FORUM du droit international, 2000, No. 1, p. 10.

IV - The ULCC Working Group on the Protection of Children and Adults Conventions

[123] A list of Members of the Working Group is attached to this Report for information.

V - Recommendation

[124] That this Report and the attached Uniform Acts be discussed and be adopted in principle.

1. Under the Divorce Act, the jurisdiction could be the habitual residence or the province in which the party has resided for at least one year immediately preceding the commencement of the proceeding.

2. Aldé Frenette, delegate for civil law and Jay Chalke, delegate for Common Law, provided useful explanation of powers of representation to the Commission.

3. The Federal State Clause committee, chaired by Mrs. Boras from Spain, included Australia, Belgium, Canada, China, Spain, the United Kingdom, the United States of America and the Permanent Bureau of The Hague Conference on Private International Law.