

UNIFORM LAW CONFERENCE OF CANADA

CIVIL SECTION

**UNIFORM RULES TO IMPLEMENT THE HAGUE CONVENTION ON THE
SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN
CIVIL OR COMMERCIAL MATTERS**

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Victoria, British Columbia

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[1] In June 2013, the Advisory Committee on Program Development and Management accepted a project proposal prepared by Justice Canada and supported by Justice Canada's Advisory Group on Private International Law to establish a Working Group to identify any gaps in the implementation of the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (Service Convention) in Canada and to draft uniform rules to clarify its application.

[2] Although the work of the Conference normally results in the adoption of uniform acts, the Conference has worked on uniform rules in the past. In 1945, it adopted the Service of Process by Mail Act and recommended that the rules set out by the act be inserted in the relevant legislation or regulation.

ISSUE

[3] Implementation of the Hague *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (Service Convention) is not uniform across all Canadian jurisdictions. Some court decisions are out of sync with the application and interpretation of the Convention that has been agreed to by Contracting States. This situation puts Canada at risk of not meeting its international obligations under the Convention.

BACKGROUND

[4] Canada has been party to the Service Convention since 1989. The Convention is currently in force in 68 States, including Canada. It is aimed at facilitating the service of documents through Central Authorities established in each Contracting State. The Convention allows service to be effected by other methods such as service through postal channels in Contracting States that have not objected to their use.

Implementation of the Convention in Canada

[5] Uniform implementing legislation for this Convention has not been prepared by the Uniform law Conference of Canada. The Convention was implemented federally in the *Federal Courts Rules* and *Tax Court of Canada Rules (General Procedure)* and by most provinces and territories in their rules of civil procedure.

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[6] The rules implementing the Convention are similar in some common law jurisdictions but are not uniform. Some rules provide that service in Contracting States must be made as prescribed by the Convention while others enumerate service under the Convention as one possible way, among others, of effecting service. With respect to Quebec, the government of Quebec issued a decree in 1988 declaring the Convention to apply in the province and implemented Articles 15 and 16 in its Code of Civil Procedure which deal with default judgments.¹ Article 494 of [*Bill n°28: An Act to establish the new Code of Civil Procedure*](#) which gives the force of law to the Convention will clarify the application of the Convention in Quebec if it is adopted.²

CONSIDERATIONS

Gaps in the Implementation of the Service Convention in Canada

Convention not Implemented in some Rules dealing with Service

[7] The Convention has not been implemented in some rules of civil procedure which contain rules on service such as the Supreme Court Rules, rules of small claims courts and family law rules. A Working Group could consider whether implementation in these rules is necessary and, if so, how it might best be done.

[8] The absence of specific rules governing service in Contracting States in these rules is problematic. First, service effected in other Contracting States under these rules could be effected by a method that is inconsistent with Canada's obligations under the Convention even though it might be valid according to the rules. Second, a judgement made after service was so effected could be denied recognition and enforcement in other Contracting States on the basis that the service did not comply with the requirements of the Convention.

[9] To our knowledge, the fact that these rules do not prescribe service under the Convention in other Contracting States has not received judicial consideration.

Uncertainty with Respect to the Implementation of Article 16 of the Convention

[10] Another area where implementation of the Convention in Canada is not uniform and which could lead to judicial interpretation that is contrary to Canada's obligations under the Convention is with respect to the application of Article 16 of the Convention. To our knowledge, Article 16 of the Convention has not received judicial consideration in Canada.

[11] Article 16 allows a defendant who has not appeared, and against whom a default judgment was rendered, to apply for relief from the effects of the expiration of the time for appeal from the judgment where certain conditions are met. Article 16(3) allows States to declare that an application will not be entertained if it is filed after the expiration of a time stated in the declaration but prohibits States from setting a time that is less than one year following the date of the judgment.

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[12] The federal government made the following declaration when it acceded to the Convention:

an application filed under Article 16 of the Convention will not be entertained if it is filed after the expiration of one year following the date of the judgment, except in exceptional cases determined by the rules of the Court seized of the matter.

[13] The content of Canada's declarations is reflected in some rules of courts implementing the Convention,³ but in others there is a general rule with respect to the time for appeal which does not reflect the content of Canada's declaration.

Judicial Interpretation of Rules Implementing the Convention in Canada

[14] The rules implementing the Convention have been subject to judicial interpretation in Canada which has led to some decisions that are out of sync with the interpretation of the Convention accepted by Contracting States, including Canada.

Judicial Decisions Validating Service by a Method not Prescribed by the Convention

[15] Service in Contracting States done by methods that are not prescribed by the Convention has, at times, been validated by some courts in Canada.⁴ Decisions validating such service were rendered despite the fact that the only methods available for serving judicial and extrajudicial documents in civil or commercial matters from one Contracting State to another are those provided by the Convention. This interpretation of the Convention was confirmed in 2003 and 2009 by Contracting States, including Canada, at meetings of the Special Commission on the Practical Operation of the Convention. It was also confirmed recently by the Ontario Court of Appeal⁵ and the Alberta Court of Appeal.⁶

[16] Decisions by Canadian courts which validate service by a method not prescribed by the Convention are troublesome as they create legal uncertainty with respect to their effect in other Contracting States. Courts in other Contracting States may decide that service that was not done by a method prescribed by the Convention is not valid in their jurisdiction and thus refuse to recognize and enforce such decisions.⁷ Such decisions are also problematic as they could lead to Canada being criticized by other Contracting States for not respecting its obligations under the Convention.

Judicial Decisions Questioning the Application of the Convention in some Canadian Jurisdictions

[17] Courts in Canada have also questioned whether the Convention or some of its provisions have been implemented in their jurisdiction. These decisions are problematic

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as the Convention is in force internationally for Canada as a whole and Canada did not exclude the application of any Article of the Convention to Canada when it acceded to it.

[18] The Quebec Court of Appeal decided in 1998 that service made on a defendant in France by a method not prescribed by the Convention was valid because the Convention's rules with respect to service in Contracting States were not implemented in Quebec law. According to the Court, the Convention has not been implemented in Quebec law because it does not contain implementing legislation and its existing laws with respect to service have not been amended.⁸ The Court acknowledged that the Convention's rules with respect to default judgments were implemented in the *Code of Civil Procedure* but these rules were not at issue.

[19] In *Khan Resources Inc. v. Atomredmetzoloto*, the Superior Court of Ontario stated that "though specific articles of the Service Convention have been implemented into domestic law, the Service Convention in its entirety has not."⁹ The Court's statement in *Khan* is problematic as it could be used to bolster an argument that parts of the Convention have not been implemented in Ontario or elsewhere in Canada. On appeal, the Court of Appeal did not turn its mind to the extent to which the Convention has been implemented in Ontario.

DESIRED OUTCOME

[20] Uniform rules would help:

- ensure that the Convention is applied when service of judicial and extra judicial documents in Contracting States is involved;
- clarify the application of the Convention in Canada and reduce litigation costs associated with questions on service in Contracting States;
- ensure that Canada's obligations under the Convention are met;
- ensure that judgments from Canadian courts would not be denied recognition and enforcement in Contracting States on the basis that service did not comply with the requirements of the Convention;
- improve predictability in the application of the Convention in Canada and ensure that it is applied uniformly throughout Canada.

WORK TO DATE

[21] Justice Canada has contacted jurisdictional representatives to seek Working Group members and encouraged them to identify individuals responsible for amending rules of court in their jurisdiction to participate in the Working Group or to be consulted by the Working Group.

[22] Currently, the Working Group is composed of:

- Valérie Simard (Justice Canada – International Private Law Section)

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- Patrick H. Xavier (Justice Canada – Judicial Affairs Section)
- Craig Dennis (British Columbia – Dentons Canada LLP)
- Brand Kring (Alberta – Department of Justice and Solicitor General)
- Nina Gandhi (Ontario – Ministry of the Attorney General)
- Janet Chow (Ontario – Ministry of the Attorney General)
- Frédérique Sabourin (Quebec – Ministère de la Justice)
- Renée Gingras (Quebec – Ministère de la Justice)

The Working Group welcomes additional members.

[23] The Working Group met once in July 2013 to discuss its working methods. The Working Group proposed to prepare recommendations and drafting instructions for uniform rules and submit these to the Conference in August 2014. The Working Group will work with legislative drafters in 2014-2015 to prepare uniform rules. It will also prepare commentaries to these rules and draft guidance for jurisdiction jurisdictions wishing to adopt the rules.

[24] The Conference is asked to provide comments and guidance to the Working Group on the project.

¹ Article 15 sets out the conditions for giving judgment where service under the Convention was made but the defendant failed to appear and Article 16 sets out the conditions for obtaining relief from the expiration of the time limit to appeal such judgment.

² The draft bill was introduced in the National Assembly on April 30th, 2013 and the Assemblée nationale agreed to be seized of the bill. Québec, National Assembly, *Hansard*, 45 (30 April 2013). The bill is available online at: <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-28-40-1.html>.

³ For example, Rule 69.01(3) of the *Rules of Court* of Manitoba reflects Canada's declaration.

⁴ *Tamlin International Homes v. Ikoma et al*, 2001 BCSC 1039 (*Tamlin International*); *Metcalfe v. Yamaha Motor Canada Ltd.*, 2011 ABQB 807 (reversed 2012 ABCA 240); *S.A. Louis Dreyfus & Cie c. Holding Tusculum BV* [1998] RJQ 1722 (C.A.) (*Dreyfus*).

⁵ *Khan Resources Inc. v. Atomredmetzoloto* 2013 ONCA 189.

⁶ *Metcalfe v. Yamaha Motor Powered Products Co.*, 2012 ABCA 240.

⁷ See for instance, *supra* note 3, *Tamlin International*.

⁸ *Supra* note 3, *Dreyfus*.

⁹ 2012 ONSC 1522 at para. 38.