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[02/05/1996; The Supreme Court of Canada; Superior Appellate Court]
W.(V.) v. S.(D)., (1996) 2 SCR 108, (1996) 134 DLR 4th 481

The Supreme Court of Canada

D.S. v. V.W.; J.S. et al., mis en cause

2 May 1996

Ghislain Richer, Julie Lessard and Marc Baillargeon , for the appellant.

Roseline Alric , for the respondent.

Guy Lecompte , for the mis en cause Blais.

The judgment of Lamer C.J. and McLachlin, Iacobucci and Major JJ. was delivered by

MCLACHLIN J. -- I agree with L'Heureux-Dubé J., subject to my comments in Gordon v. Goertz , [1996] 1 S.C.R. 27, on the rights and obligations of custodial parents.

The reasons of La Forest, L'Heureux-Dubé and Gonthier JJ. were delivered by

L'HEUREUX-DUBE J.-- This appeal concerns the Hague Convention on the Civil Aspects of International Child Abduction, Can. T.S. 1983 (the "Convention"), as implemented in Quebec by An Act respecting the civil aspects of international and interprovincial child abduction, R.S.Q., c. A-23.01 (the "Act"). The specific question is whether the Act is applicable to the circumstances of this case. If so, did the Quebec Court of Appeal, like the Superior Court, err in confirming the order made under the Act to return the child to the United States? If not, the question that arises is whether the Superior Court had jurisdiction to dispose of the motion for custody of the child. The concept of custody under the Convention and the Act is at the heart of this case. In the case at bar, it was to the child's father, the appellant, that the courts of the state of Maryland granted custody, while the respondent mother held rights of access.

I. Facts

The turbulent history of the relations between the parties in respect of their daughter first requires a brief review of the facts.

The child of the parties was born on December 27, 1982 in Maryland, where the family was living at the time. In November 1986, the appellant left the family home, leaving the child with the respondent. The respondent prevented him from seeing the child until December 16, 1986, at which date the parties agreed that the child was to stay with the appellant until January 2, 1987. The following week, the respondent again refused to let the appellant see the child. The day after this incident, the appellant went to get the child as she was leaving school and refused to return her to the respondent.

In February 1987, the appellant filed for a divorce. On February 10, 1987, the Maryland Circuit Court granted temporary custody of the child to the appellant and recommended that the parties undergo a psychological evaluation. On September 23, 1987, Judge Fischer of the Circuit Court granted the parties joint custody of the child, while granting physical custody to the respondent. In February 1988, the appellant filed a petition in which he alleged that the respondent had committed acts of Satanism and sexual abuse against the child. On February 10, 1988, Judge Sybert of the Circuit Court granted temporary custody of the child to the appellant and denied the respondent access. On April 25, 1988, the respondent was granted supervised access. In a divorce judgment dated September 29, 1988, Judge Fischer granted custody of the child to the appellant and rights of supervised access to the respondent, which were to be re-evaluated in June 1989 after the respondent had undergone treatment. Although Judge Fischer rejected the allegations of sexual abuse, he explained that he was granting custody to the appellant because, if the child was disturbed, the respondent was the primary cause. The Court of Special Appeals of Maryland affirmed that judgment on November 8, 1989.

In November 1989, the appellant moved to Michigan with the child. On December 15, 1989, the respondent filed motions in Maryland for contempt of court, to enforce her access rights and to modify and increase access. The specific purpose of these motions was to reorganize the schedule of visits in view of the child's removal and to obtain increased rights of unsupervised access. Under an agreement entered into by the parties on February 1, 1990, a schedule of supervised visits was drawn up and the appellant agreed to have the child undergo a psychiatric evaluation in Michigan to be filed as evidence at the hearing into the respondent's motions. On March 13, 1990, the Circuit Court ratified this agreement by way of an order. In the interim, on February 13, 1990, the appellant moved to Quebec with the child without consulting or notifying the respondent.

On April 6, 1990, following a suggestion by the court, the respondent filed a petition for contempt of court and for a change of custody. The appellant did not attend at the hearing of that petition on April 16, 1990. On May 8, 1990, Judge Dudley of the Circuit Court found the appellant guilty of contempt and awarded custody of the child to the respondent " pendente lite , pending any further hearings on the issue of custody and visitation at the request of either party". That judgment was affirmed by the Court of Special Appeals on May 14, 1991.

In the interim, on May 6, 1991, the appellant filed a motion in the Superior Court of Quebec for custody of the child. The respondent countered by filing a motion in which she applied for the return of the child under the Act. She moved temporarily to Sherbrooke, where the child was residing with the appellant and his sister. Interim custody of the child was granted to the appellant's sister under an agreement between the parties endorsed on August 30, 1991 by Savoie J. of the Superior Court. The parties also recognized under that agreement that the Act was applicable to the case. In June and December 1992, Bellavance J. of the Superior Court made two orders that laid down the conditions of a supervised access program, the purpose of which was to promote the gradual resumption of contact between the respondent and the child.

On January 8, 1993, Bellavance J. dismissed the appellant's motion and ordered the child's return to the United States: [1993] R.D.F. 111. Due to the danger of the appellant's fleeing with the child once again, the judge ordered that she be placed in the custody of the Youth Protection Agency until the expiration of the appeal period. The appellant appealed the judgment, and Proulx J.A. of the Quebec Court of Appeal made an interim order that the child be placed with a foster family and that contact between the parties and the child continue to be supervised by the Youth Protection Agency until the hearing into the merits

of the appeal. On August 2, 1993, the Court of Appeal dismissed the appellant's appeal ([1993] R.J.Q. 2076, 58 Q.A.C. 168) and the respondent returned to Maryland with the child, who has apparently been there ever since.

II. Legislation

The Convention:

[PREAMBLE]

The States signatory to the present Convention,

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

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

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions:

ARTICLE 1

The objects of the present Convention are:

(a)to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b)to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

ARTICLE 3

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

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

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

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

ARTICLE 5

For the purposes of this Convention:

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

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

ARTICLE 11

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

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

ARTICLE 12

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

. . .

ARTICLE 13

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

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

(b)there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

. . .

ARTICLE 21

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

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

The Act:

[PREAMBLE]

WHEREAS the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 aims to protect children internationally from the harmful effects of their wrongful removal or retention;

Whereas the Convention establishes procedures to ensure the prompt return of children to the State of their habitual residence and to secure protection for rights of access;

Whereas Québec subscribes to the principles and rules set forth in the Convention and it is expedient to apply them to the largest possible number of cases;

THE PARLIAMENT OF QUÉBEC ENACTS AS FOLLOWS:

1.The object of this Act is to secure the prompt return to the place of their habitual residence of children removed to or retained in Québec or a designated State, as the case may be, in breach of custody rights.

A further object of this Act is to ensure that the rights of custody and access under the law of a designated State are effectively respected in Québec and the rights of custody and access under the law of Québec are effectively respected in a designated State.

2.For the purposes of this Act,

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

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

. . .

3.The removal or the retention of a child is to be considered wrongful, within the meaning of this Act, where it is in breach of rights of custody attributed to one or several persons or bodies under the law of Québec or of the designated State in which the child was habitually resident immediately before the removal or retention and where, at the time of removal or retention, those rights were actually exercised by one or several persons or bodies or would have been so exercised but for the removal or retention.

The rights of custody mentioned in the first paragraph may arise in particular by operation of law, or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of Québec or of the designated State.

4.In addition to the cases contemplated in section 3, the removal or the retention of a child is considered wrongful if it occurs when proceedings for determining or modifying the rights of custody have been introduced in Québec or in the designated State where the child was habitually resident and the removal or retention might prevent the execution of the decision to be rendered.

20.Where a child who is in Québec has been wrongfully removed or retained and where, at the time of commencement of the proceedings before the Superior Court, a period of less than one year has elapsed from the date of the removal or retention, the Superior Court shall order the return of the child forthwith.

The Superior Court, even where the proceedings have been commenced after the expiration of the period of one year, shall also order the return of the child, unless it is demonstrated that the child is now settled in his or her new environment.

25.The Superior Court, after having been notified that a child has been wrongfully removed or retained in Québec, shall not decide on the custody of the child if the conditions set out in this Act for the return of the child may be fulfilled or if an application for his or her return may be made within a reasonable time.

28.In ascertaining whether there has been a wrongful removal or retention, the Superior Court may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the designated State in which the child is habitually resident, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

30.A decision under this Act concerning the return of a child shall not be taken to be a determination on the merits of any custody issue.

31.An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Minister of Justice or to the Central Authority of a designated State in the same way as an application for the return of a child.

32.The Minister of Justice may initiate or assist in the institution of proceedings with a view to organizing or protecting access rights and securing respect for the conditions to which the exercise of these rights may be subject.

The Civil Code of Lower Canada , which was in force at the time of the relevant facts (the corresponding articles of the Civil Code of Québec , S.Q. 1991, c. 64, appear in square brackets):

30. [33] In every decision concerning a child, the child's interest and the respect of his rights must be the determining factors.

Consideration may be given in particular to the child's age, sex, religion, language, character and family surroundings, and the other circumstances in which he lives.

79. [75] The domicile of a person, for all civil purposes, is at the place where he has his principal establishment.

80. [76] Change of domicile is effected by actual residence in another place, coupled with the intention of the person to make it the seat of his principal establishment.

81. [76] The proof of such intention results from the declarations of the person and from the circumstances of the case.

83. [80] . . .

A minor whose custody has been the subject of a judicial decision is domiciled with the person who has custody of him.

When no judicial decision has been rendered with respect to custody and the minor's father and mother have no common domicile, the minor is domiciled with the parent with whom he habitually resides.

The Civil Code of Québec (1980), with the new numbering shown in square brackets:

569. [514] The court, in granting the divorce or subsequently, decides as to the custody, maintenance and education of the children, in their interest and in the respect of their rights, taking into account the agreements made between the spouses, where such is the case.

570. [605] Whether custody is entrusted to one of the spouses or to a third person, the father and mother retain the right of watching over the maintenance and education of the children, and are obliged to contribute thereto in proportion to their means.
647. [599] The father and mother have the rights and duties of custody, supervision and education of their children.

. . .

650. [602] No unemancipated minor may leave the family home without the consent of the person having parental authority.

653. [604] In the case of difficulties relating to the exercise of parental authority, the person having parental authority may refer the matter to the court, which will decide in the interest of the child after fostering the conciliation of the parties.

The Code of Civil Procedure , R.S.Q., c. C-25:

46.The courts and the judges have all the powers necessary for the exercise of their jurisdiction. They may, in the cases brought before them, even of their own motion, pronounce orders or reprimands, suppress writings or declare them libellous, and make such orders as are appropriate to cover cases where no specific remedy is provided by law.

70.Applications in family cases are taken before the court of the common domicile of the parties or, failing such a domicile, the domicile of either of the parties.

. . .

164. Lack of jurisdiction by reason of the subject matter may be raised at any stage of the case, and it may even be declared by the court of its own motion. The court adjudicates as to costs according to the circumstances.

523. The Court of Appeal may, if the ends of justice so require, permit a party . . ., in exceptional circumstances, to adduce, in such manner as it directs, indispensable new evidence.

III. Judgments

Superior Court of Quebec , [1993] R.D.F. 111

Since the parties had not contested the applicability of the Act to the case at bar, Bellavance J.'s reasons took as their starting point the parties' admission that the removal of the child was wrongful within the meaning of the Act. He first recognized that the case did not concern the merits of the custody issue but rather whether the child was settled in Quebec. Since the child had been in Quebec for a period longer than one year, it was open to the appellant, under s. 20 of the Act, to oppose an automatic order of return by

demonstrating that the child was now settled in her new environment. According to the trial judge, whether a child is settled within the meaning of the Act does not depend solely on external factors such as the child's ability to speak French, it is also necessary that he or she not be exposed to psychological or physical harm by remaining in Quebec.

In his view, the child had been unable to settle in Quebec on account of her state of psychological alienation, for which the conduct of the appellant, although sincere, was largely responsible. The judge noted that the appellant did nothing to correct the child's obviously false perceptions, in particular those relating to the respondent's supposed ability to fly and her alleged desire to kill the child. Furthermore, because the judgments of the Maryland courts and the expert testimony at the hearing did not establish that the respondent had sexually abused the child, the judge found that the respondent represented neither a psychological nor a physical danger to the child. He, accordingly, dismissed the appellant's motion for custody of the child and ordered that she be returned to the United States.

Quebec Court of Appeal , [1993] R.J.Q. 2076 (Vallerand, Brossard and Deschamps JJ.A.)

The Court of Appeal dealt with three main issues: the application of ss. 3 and 4 of the Act, the interpretation of s. 20 of the Act and its application to the facts of the case.

Concerning the application of the Act, the court unanimously held that the Act was applicable even though the court was not bound by the parties' admission on this point. Since, on the one hand, the agreement of February 1, 1990 between the parties implicitly prohibited the removal of the child should removal deprive the respondent of her rights of access, and on the other hand, the appellant's rights of custody were rendered precarious by the fact that he moved to Quebec, the court considered that the respondent held rights of custody within the meaning of the Act which entitled her to claim the return of the child under s. 3 of the Act. To reach this conclusion, the court relied on an interpretation of the concept of custody that it described as [TRANSLATION] "large".

In concurring reasons, Brossard J.A. concluded that s. 4 of the Act was also applicable. In his view, since the removal of a child is a ground for reviewing a custody award, the motions pending in the Maryland courts when the child was removed were "proceedings for . . . modifying the rights of custody" of the appellant within the meaning of s. 4 of the Act. He also considered that the Maryland courts had retained jurisdiction to rule on the custody of the child and that the Act was applicable as a result of the "interim" custody granted to the respondent in the May 8, 1990 judgment of the Maryland Circuit Court, which rendered the retention of the child wrongful within the meaning of s. 3 of the Act.

On the merits of the case, namely the settlement of the child, the court unanimously held that the trial judge had not erred in interpreting s. 20 of the Act and applying it to the facts of the case. Its analysis of the evidence confirmed the judge's finding that the child suffered from serious emotional deprivation. The court also found that there was no danger of psychological trauma from the immediate return of the child to the United States even though one of the three expert witnesses disagreed in his testimony (which the trial judge did not take into account); its finding was based in particular on the fact that, according to the order for return, the child was to be placed in a neutral environment until the enforcement of the judgment. The appellant's appeal was accordingly dismissed.

IV. Analysis

The main issue is whether, as the Superior Court and Court of Appeal held, the Act is applicable to the circumstances of the instant case. The concept of custody under the Convention and the Act is crucial to resolving this issue.

At the outset, however, it is necessary to determine the effect of the admission of the parties that the Act applied as regards the jurisdiction of the Superior Court to entertain the case. It is well settled that a court is not bound by an admission of law, and this is especially true of an admission as to its jurisdiction: the parties cannot attribute jurisdiction to a court that it does not otherwise have (L. Ducharme, Précis de la preuve (4th ed. 1993), at p. 210). In the case at bar, the Superior Court clearly would not have had jurisdiction to hear and determine the case under the Act if the Act were inapplicable. Similarly, it could not, as s. 25 of the Act provides, have ruled on the merits of the custody of the child if the Act were applicable. A court may of its own motion raise its own lack of jurisdiction by reason of the subject matter at any stage of the case, even on appeal (art. 164 C.C.P. ; Messier v. Palomba , [1992] R.D.J. 548 (C.A.)). This is an exception to the general rule that a new argument cannot be raised on appeal, not even on a question of law, unless all the evidence needed to determine it is already in the record (Équipements Lefco Inc. v. Roche Ltée , [1993] R.D.J. 234 (C.A.); Hamel v. Cie Trust Royal , [1990] R.J.Q. 2178 (C.A.); to the same effect: J. Sopinka and M. A. Gelowitz, The Conduct of an Appeal (1993), at p. 54). As a result, the Court of Appeal was right to begin by considering the issue of whether the Act was applicable even though it had not been raised at trial.

On this point, the respondent argued that the absence at trial of specific evidence of the law of Maryland with regard to the nature of the parties' respective rights barred the Court of Appeal from reviewing the issue of whether the Act was applicable. Although no such evidence was adduced, I am nevertheless of the view that there is sufficient evidence in the record in order to decide the question. Among the nine Maryland court judgments included in the record, that of May 14, 1991 by the Court of Special Appeals contains a discussion several pages long on the principles of law to be applied in Maryland in respect of the modification of a custody order after the custodial parent has removed the child. Furthermore, the whole of the proceedings instituted by the respondent in Maryland, which are also included in the record, provide an invaluable indication of the actual scope of the parties' respective rights.

Having said this, even assuming that the record is incomplete, in my view this is not fatal in the circumstances. Even if the foreign law is to be treated as a fact which, in theory, must be proved, where there is no such evidence courts will apply the law in force in Quebec (E. Groffier, Précis de droit international privé québécois (4th ed. 1990), at pp. 94-99; Thomson v. Thomson , [1994] 3 S.C.R. 551, at p. 588 (per La Forest J.)). Furthermore, it should be noted that s. 28 of the Act authorizes Quebec courts, on an exceptional basis, to take judicial notice of the content of the foreign law in ascertaining whether there has been a wrongful removal or retention within the meaning of the Act. In addition, even in the absence of evidence, it would have been open to the Court of Appeal to use its power under art. 523 C.C.P. to receive indispensable new evidence in exceptional circumstances if the ends of justice so required (Montana v. Développements du Saguenay Ltée , [1977] 1 S.C.R. 32, at p. 38 (per Pigeon J.)). Thus, the application of these rules would compensate for the absence of specific evidence in the record respecting the law of Maryland on this question.

20 This leads us to the issue of whether the Act is applicable to the circumstances of the instant case. This determination will depend on the definition of the concept of custody under the Convention and the Act.

I

Concept of Custody under the Convention and the Act

1. The Convention

The fundamental objective of the Convention, as stated in its preamble, is "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access". According to Articles 3 and 12 of the Convention, the mandatory return procedure provided for in the Convention is set in motion only where a child has been removed or retained in breach of rights of custody. As for rights of access, Article 21 provides that the administrative organizations of the Central Authorities designated by the states parties to the Convention are responsible for securing respect therefor. For example, a parent prevented from exercising his or her rights of access due to the removal of a child, to Quebec or a designated state within the meaning of the Act, has a remedy of securing the organization or protection of those rights in accordance with the procedure laid down in ss. 31 and 32 of the Act. In "The Hague Convention on International Child Abduction" (1981), 30 Int'l & Comp. L.Q. 537, at p. 555, A. E. Anton explained the rationale for the difference in the protection accorded to rights of custody and rights of access as follows:

It was felt not only that mandatory rules in the fluid field of access rights would be difficult to devise but, perhaps more importantly, that the effective exercise of access rights depends in the long run more upon the goodwill, or at least the restraint, of the parties than upon the existence of formal rules.

J. M. Eekelaar made a similar comment in "International Child Abduction by Parents" (1982), 32 U.T.L.J. 281, at p. 315:

The reason for this is that disputes about access are notoriously difficult to unravel (it might be alleged that the absent parent was visiting very infrequently, or that the children disliked the visits), and to order the return of the children when such matters may well be in dispute is to provide too drastic a remedy.

Thus, the Convention makes a clear distinction between rights of access, which "include the right to take a child for a limited period of time to a place other than the child's habitual residence", and custody rights, which are defined as "includ[ing] 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 noted by Eekelaar, supra , at p. 309, what the Convention means by "rights of custody" must by determined independently of the domestic law of the jurisdictions to which it applies:

States may define the term `custody' in whatever way they choose, but what is essential for determining their obligations under the convention is the definition used in the convention. This definition is open-ended in that it specifies rights of custody as including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence (article 5). Such rights, by whatever name they might be called in a state's domestic legal system, are `rights of custody' for the purposes of the convention and are protected by it. [Emphasis added.]

As a result:

The key concepts which determine the scope of the Convention are not dependent for their meaning on any single legal system. Thus the expression "rights of custody", for

example, does not coincide with any particular concept of custody in a domestic law, but draws its meaning from the definitions, structure and purposes of the Convention.

(Hague Conference on Private International Law, Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (1993), at p. 16, quoted by V. Black and C. Jones, Case comment on Thomson v. Thomson (1994), 12 C.F.L.Q. 321, at p. 327.)

However, although the Convention adopts an original definition of rights of custody, the question of who holds the "rights relating to the care of the person of the child" or the "right to determine the child's place of residence" within the meaning of the Convention is in principle determined in accordance with the law of the state of the child's habitual place of residence (Black and Jones, supra , at p. 331; L. Silberman, "Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis" (1994), 28 Fam. L.Q. 9, at p. 18).

The Convention was analysed in detail in Thomson , in which its interpretation and application were raised in this Court for the first time. Since the decision of the Court of Appeal in the case at bar preceded that judgment, it is, I believe, appropriate to briefly recall its main holding.

2. Thomson

In Thomson , the child was removed from Scotland to Canada by his mother, who had interim custody pursuant to an order containing a prohibition against the child being taken out of Scotland. When the mother applied for custody in Manitoba, the father applied for the return of the child to Scotland under the Convention, as introduced into the law of Manitoba by means of the Child Custody Enforcement Act , R.S.M. 1987, c. C360. The Court was required to rule on, inter alia , the nature of the rights of custody provided for in the Convention, the effect of an order prohibiting the child's removal that is included in an interim custody order, and the interrelationship between the Convention and the Manitoba legislation.

The Court clearly established that "the primary object of the Convention is the enforcement of custody rights" (emphasis in original) and as a consequence that the mandatory return procedure dictated by the Convention is limited to cases where the removal of a child is in violation of the custody rights -- and not rights of access only -- of a person, institution or other body (Thomson , supra , at pp. 579 and 581 (per La Forest J.)). As for the effect of including a restriction on removal of a child in an interim custody order, although the Court considered that such a restriction conferred rights of custody within the meaning of the Convention on the court with jurisdiction to render a final decision as to custody, it took care to state that the situation might be different if the removal of the child were prohibited by a clause in a permanent custody order. According to La Forest J., at pp. 589-90:

Such a clause raises quite different issues. It is usually intended to ensure permanent access to the non-custodial parent. The right of access is, of course, important but, as we have seen, it was not intended to be given the same level of protection by the Convention as custody . The return of a child in the care of a person having permanent custody will ordinarily be far more disruptive to the child since the child may be removed from its habitual place of residence long after the custody order was made. The situation also has serious implications for the mobility rights of the custodian. [Emphasis added.]

See also Thomson , supra , at pp. 606-7 (per L'Heureux-Dubé J.). However, the Court held that, in the specific case before it, the removal of the child was wrongful within the

meaning of the Convention and, because it had not been demonstrated that the situation fit into any of the exceptions provided for therein, ordered that the child be returned to Scotland.

The issue of the relationship between the Convention and the Child Custody Enforcement Act arose because in Canada, the Convention has been implemented by the provinces, which, with the exception of Quebec, have incorporated it into their domestic law in its entirety through other legislation. As its name indicates, the Manitoba legislation deals primarily with the recognition and enforcement of custody orders made outside Manitoba. Although La Forest J., writing for the majority on this subject, concluded that there was a dichotomy between the two systems, he nevertheless stated the following at p. 603:

. . . where the provisions of the Act are selected it may not be improper to look at the Convention in determining the attitude that should be taken by the courts, since the legislature's adoption of the Convention is indicative of the legislature's judgment that international child custody disputes are best resolved by returning the child to its habitual place of residence. . . .

Since the situation in Quebec can be distinguished from that in Manitoba in that the sole purpose of the Act is to give effect to the Convention even though it does not adopt the integral wording thereof, two independent systems cannot coexist in Quebec. On the contrary, the interdependence of the Convention and the Act is recognized both in the preamble to the Act, which states that "Québec subscribes to the principles and rules set forth in the Convention", and in s. 1 thereof, which states the common objects of the Act and the Convention. Furthermore, the Act adopts verbatim the Convention's definitions of rights of custody and rights of access. Thus, like the Convention, the Act, by authorizing the prompt return of children to the place of their habitual residence only if they are removed or retained in breach of custody rights, reserves a form of protection for custody rights distinct from that for rights of access. In my view, the interdependence of the Convention and the Act accordingly suggests an interpretation of ss. 3 and 4 of the Act that gives full effect to the object of the Convention while taking the guidelines set out in Thomson into account.

It is against this backdrop that the Act, and more specifically ss. 3 and 4 thereof, must now be interpreted in respect of the concept of custody.

3. The Act

As I mentioned previously, in Quebec it is the Act that gives effect to the Convention. The relevant provisions of the Act, which I will now discuss, are ss. 3 and 4.

(a) Section 3

According to s. 3 of the Act, quoted earlier -- which reproduces almost verbatim Article 3 of the Convention as interpreted in Thomson -- the removal or retention of a child is wrongful "where it is in breach of rights of custody". In light of the principle stated in Thomson as to the object of the mandatory return procedure established by the Convention, it is clear that s. 3 of the Act, in initiating that return procedure, is concerned exclusively with the protection of rights of custody and not with compliance with rights of access.

The Act's definition of rights of custody has two branches: "rights relating to the care of the person of the child" and "the right to determine the child's place of residence"; in some cases, these attributes of custody rights are susceptible to severance (Eekelaar, supra , at pp. 309-10; J. G. McLeod, Case comment on Thomson v. Thomson (1994), 6 R.F.L. (4th) 406, at pp. 408-9). For example, in Thomson , this Court held that the express prohibition on

removing the child, that was included in the interim order giving custody to the mother, conferred on the court rights of custody within the meaning of the Convention, even though the order in question entrusted "rights relating to the care of the person of the child" to the mother on an interim basis.

In my view, the possibility of severing the right to determine the child's place of residence from rights of custody must be considered in light of the fundamental purpose of the Act: to prevent any person, including the non-custodial parent, regardless of whether he or she has rights of access, from removing or retaining a child, custody of whom has been awarded to one parent, to or in a place other than the child's habitual residence. From this perspective, the Act clearly suggests a large and liberal interpretation of the custody concept. More specifically, rights of custody within the meaning of the Act cannot be interpreted in a way that systematically prevents the custodial parent from exercising all the attributes of custody, in particular that of choosing the child's place of residence, but, on the contrary, must be interpreted in a way that protects their exercise. The comments of K. B. Farquhar in "The Hague Convention on International Child Abduction Comes to Canada" (1983), 4 Can. J. Fam. L. 5, at p. 15, shed an interesting light on this:

As is to be expected in an international convention designed to apply to as many legal systems as possible, no attempt is made to define exhaustively the term "custody". Instead, Article 5(a) provides that the words "rights of custody" shall include "rights relating to the care of the person of the child and in particular the right to determine the child's place of residence". This reveals that the term "custody" is used as an abbreviation for what the Convention is really trying to achieve -- a system that will try to perpetuate continuity in environment for a child rather than maintain the legal concept of custody in all its various manifestations . [Emphasis added.]

Some authors have been critical of the fact that the Convention protects only custody rights, provided that they are awarded by a permanent order of custody, without regard to any circumstances suggesting that they are in reality unsettled (Black and Jones, supra , at pp. 329-31; McLeod, supra , at p. 409). According to Black and Jones, the recognition of custody rights within the meaning of the Convention -- and consequently the protection of the exercise of the attributes thereof, such as the right to determine the child's place of residence -- implies the demonstration of a certain stability regarding, inter alia , the exercise of rights of access. This criticism applies equally in respect of the Act, which is to the same effect as the Convention on this point.

For all practical purposes, what this interpretation of custody rights requires of a court in a jurisdiction other than that to which the child is to be returned, is a critical review of the merits of any custody issue, which is, in my view, inconsistent with the very philosophy of the Convention and the Act in that it tends not only to make the process of returning a child cumbersome and to slow it down, but also to fundamentally alter its nature.

The automatic return procedure implemented by the Act is ultimately intended to deter the abduction of children by depriving fugitive parents of any possibility of having their custody of the children recognized in the country of refuge and thereby legitimizing the situation for which they are responsible. To that end, the Act favours the restoration of the status quo as soon as possible after the removal of the child by enabling one party to force the other to submit to the jurisdiction of the court of the child's habitual place of residence for the purpose of arguing the merits of any custody issue. The Act, like the Convention, presumes that the interests of children who have been wrongfully removed are ordinarily better served by immediately repatriating them to their original jurisdiction, where the merits of custody should have been determined before their removal. Once that determination has been made,

the Convention and the Act give full effect thereto by protecting custody rights through the mandatory return process. See generally R. Schuz, "The Hague Child Abduction Convention: Family Law and Private International Law" (1995), 44 Int'l & Comp. L.Q. 771, at pp. 775-76; Farquhar, supra , at p. 10; Anton, supra , at pp. 542-43.

Thus, the Convention and the Act represent a compromise between the flexibility derived from reviewing each situation on its merits and the effectiveness needed to deter international child abduction, which depends in particular on the rapidity of the return procedure. As s. 30 of the Act provides, "[a] decision under this Act concerning the return of a child shall not be taken to be a determination on the merits of any custody issue". According to s. 20 of the Act, when a court finds that there has been a wrongful removal within the meaning of s. 3 or 4 of the Act, it must automatically order the return of the child unless the person who opposes that return can prove that the situation falls within one of the exceptions provided for therein, such as the settlement of the child in his or her new environment. From this perspective, those exceptions, which recognize that an order for return can, in certain circumstances, be contrary to the interests of the child, have generally been interpreted narrowly (Silberman, supra , at pp. 25-31). At the procedural level, the expeditiousness of proceedings for the return of a child is ensured, inter alia , by s. 19 of the Act, which provides that they take precedence over all other matters as provided in art. 861 C.C.P. for habeas corpus proceedings. It should also be noted that s. 27 of the Act requires the Minister of Justice to indicate the reasons for a failure by the Superior Court to reach a decision within six weeks from the filing of an application for the return of a child.

In summary, the application of the Act is triggered under s. 3 where a child is removed or retained in breach of rights of custody within the meaning of the Act, as opposed to rights of access only. Although it is true that an interim custody order combined with an order restricting the removal of a child might temporarily deprive the person awarded custody of the right to determine the child's place of residence by making any removal of the child wrongful within the meaning of s. 3 of the Act, aside from this exception, the large and liberal interpretation to be given to the concept of custody under the Act is not affected. A narrow reading would contradict the very object of the Act, namely to protect rights of custody and the exercise of the attributes thereof, including the choice of the child's place of residence. Since the foundation of the Act is the rapidity of the mandatory return process and the principle that the merits of issues related to the custody of children who have been wrongfully removed or retained are to be determined by the courts of their habitual place of residence, the very philosophy of the Act militates against bringing the unsettled factual basis of a custody order into play at this stage of the exercise. Section 4 of the Act meets those objections, however.

(b) Section 4

While s. 3 of the Act is based on the wording of the Convention, s. 4 represents an original initiative by the Quebec legislature. I reproduce s. 4 again for the sake of convenience:

4. In addition to the cases contemplated in section 3, the removal or the retention of a child is considered wrongful if it occurs when proceedings for determining or modifying the rights of custody have been introduced in Québec or in the designated State where the child was habitually resident and the removal or retention might prevent the execution of the decision to be rendered.

In addition to cases of wrongful removal or retention within the meaning of s. 3 of the Act, it can be seen that s. 4 corresponds exactly to the objective of the Convention, namely protection of the right of custody, by making it possible to order the return of a child whose

removal or retention "occurs when proceedings for determining or modifying the rights of custody have been introduced in Québec or in the designated State where the child was habitually resident and the removal or retention might prevent the execution of the decision to be rendered". It is thus necessary to consider the interaction between ss. 3 and 4 of the Act as well as the common objective of the Convention and the Act in order to obtain a clearer idea of the scope of s. 4.

In my view, s. 4 merely expands the concept of "wrongful removal"; it does not broaden the Act's definition of rights of custody. Under s. 4, a party who may be awarded rights of custody within the meaning of the Act can apply for the child's return even if the child is removed before the court's decision is rendered. In this way, by taking account of the fact that custody rights obviously become unsettled when the right to apply for a modification thereof has been exercised, s. 4 ensures that the execution of the custody order that is eventually made will not be frustrated by the untimely removal of the child.

The respondent objected to this concept of custody rights under both ss. 3 and 4 of the Act.

The respondent made two arguments in support of her claim that, in Maryland, she had rights of custody within the meaning of the Act, making the child's removal wrongful under s. 3 of the Act. Although the respondent acknowledged that the appellant was awarded custody rights in Maryland that were a priori permanent, she asked this Court to consider the unsettled nature of those rights in the factual context of the case at bar. According to the respondent, the fact that the appellant removed the child without telling her or obtaining her consent automatically conferred rights of custody within the meaning of the Act on the Maryland courts, since the removal was a circumstance that might permit the custody order to be reviewed under both Maryland and Quebec law. In the alternative, the respondent argued that she had an implicit right to oppose the child's removal that was equivalent to rights of custody within the meaning of the Act. These two submissions basically reflect the Court of Appeal's interpretation of the concept of custody under the Act in the case at bar and must, in my opinion, be rejected.

While the Court of Appeal described its interpretation of the concept of custody as [TRANSLATION] "large", it actually adopted a very narrow interpretation in order to find that, although the respondent had only access rights, she had rights of custody within the meaning of the Act when the child was removed. By confusing, for all practical purposes, the concepts of custody rights and access rights, this interpretation amounts to saying that any removal of a child without the consent of the parent having access rights could set in motion the mandatory return procedure provided for in the Act and thus indirectly afford the same protection to access rights as is afforded to custody rights. In this regard, it is interesting to note the comments of Anton, supra , at p. 546, who seemed to exclude this possibility:

> **It is clear also from the definitions of custody and access in Article 5 that the removal or retention of a child in breach merely of access rights would not be a wrongful removal or retention in the sense of Article 3 . It is less clear, but the definition of "rights of custody" in Article 5 at least suggests, that the breach of a right simply to give or to withhold consent to changes in a child's place of residence is not to be construed as a breach of rights of custody in the sense of Article 3. A suggestion that the definition of "abduction" should be widened to cover this case was not pursued. [Emphasis added.]**

It could, of course, be argued that an award of custody rights is never permanent because of the changeability over time of each of the circumstances relating to the child that may affect his or her best interests. Thus, the removal of a child from one country to another is undoubtedly a significant change in that child's situation and may justify an application for

a review of the award in certain circumstances. However, this does not mean that the courts in the child's original jurisdiction automatically have rights of custody within the meaning of the Act following that removal. Accepting such a submission would amount to saying that all custody is unsettled and that every time a custodial parent removes a child there might be a wrongful removal within the meaning of the Act. In my view, that is not the purpose of the Act, especially since the relevance of the unsettled nature of custody rights is clearly limited by s. 4 of the Act, which is directed to the specific situation in which proceedings for modifying those rights have actually been introduced when the child is removed.

I would also reject the respondent's alternative argument that the custody order made in the appellant's favour in Maryland implicitly included a prohibition on removing the child, thereby granting the respondent rights of custody within the meaning of the Act, and that the source of this prohibition is Maryland law, Quebec law, the judgments already rendered by the Maryland courts or the proceedings pending there. This argument flows from the first in that it also incorrectly equates custody rights in the strict sense with the right to apply for a modification of custody rights after the child is removed.

An examination of the Court of Special Appeals' judgment on May 14, 1991 shows that Maryland law reflects the principles applicable in Quebec with respect to the custodial parent's power to choose the child's place of residence. When the custodial parent unilaterally moves the child, this does not automatically result in a modification of the custody order. However, such a move may justify a review of that order if the parent objecting to it shows that there has been a "substantial change of circumstances" affecting the child's interests to such an extent as to justify the court's intervention. Thus, as is the case in Quebec, Maryland law recognizes that the custodial parent's decision-making power includes the choice of the child's place of residence, subject to the non-custodial parent's right to object to that choice if he or she considers it contrary to the child's interests.

Moreover, although Thomson did not determine whether an implicit restriction on removing a child under a court order or statute confers rights of custody within the meaning of the Act on either the court or the non-custodial parent, this Court's limitation of the effect of an express non-removal clause in a permanent custody order casts serious doubt on the validity of the respondent's argument.

The respondent is also asking this Court to depart from the literal meaning of the words "proceedings for . . . modifying the rights of custody" in s. 4 of the Act so as to include therein any proceedings for modifying access rights, on the basis that any modification of access rights, which are a component of custody rights, affects and limits custody rights accordingly. In my view, this interpretation must be rejected since it does not take into account the interaction between ss. 3 and 4 or the common objective of the Convention and the Act. As I stated above, only custody rights are protected by the mandatory return procedure provided for in the Act and s. 4 expands only the Act's concept of "wrongful removal", not that of "custody". The effect of the interpretation suggested by the respondent would be to afford the same protection to any access rights that are the subject of court proceedings as is afforded to custody rights. In my opinion, neither the purpose nor the letter of s. 4 supports compromising in this manner the distinction made by the Act between custody rights and access rights. Moreover, an acknowledgment that s. 4 of the Act extends the scope of the Convention in this way would fail to take account of the common objective of the Act and the Convention calling for the two documents to be interpreted consistently with each other.

Having disposed of this aspect of the proceedings, it must now be decided whether the Act is applicable to the circumstances of this case as the trial judge and the Court of Appeal found.

4. Application to the Case at Bar

The child was removed from Maryland to Michigan in November 1989 and from Michigan to Quebec on February 13, 1990. On the latter date, the most recent decision concerning the child's custody was that rendered by the Circuit Court of Maryland on September 29, 1988 (affirmed by the Maryland Court of Special Appeals on November 8, 1989) awarding the appellant permanent custody of the child and the respondent supervised access rights. The motions made by the respondent in Maryland on December 15, 1989, which concerned only the enforcement, modification and expansion of her access rights, had not yet been ruled on and the appellant, at that time, was in Michigan with the child. However, under the agreement of February 1, 1990, a schedule of supervised visits had been established and the appellant had agreed to have the child undergo a psychiatric evaluation in Michigan to be filed as evidence when the respondent's motions were heard. Although the appellant did disregard that agreement when he left Michigan for Quebec on February 13, 1990, he did have permanent custody of the child without any restriction as to her removal.

In light of the concept of custody under the Act, the child's removal was therefore not wrongful within the meaning of s. 3 of the Act. Nor can the situation be described as a "wrongful retention" within the meaning of that section. On this point, I will simply refer to the comments of La Forest J. in Thomson , supra , at pp. 592-93, where he found that the ex parte custody order obtained by the father in Scotland in that case following the child's removal did not confer custody rights on him that made the child's retention in Manitoba wrongful:

There is nothing in the Convention requiring the recognition of an ex post facto custody order of foreign jurisdictions. . . . "[W]rongful retention" . . . does not contemplate a retention becoming wrongful only after the issuance of a "chasing order". . . .

To paraphrase, a wrongful retention begins from the moment of the expiration of the period of access, where the original removal was with the consent of the rightful custodian of the child.

As for the proceedings pending when the child was removed, since they related solely to the respondent's access rights and not the appellant's custody rights, it must be concluded that s. 4 does not apply either. In this respect, the fact that the respondent applied only for a modification of her access rights when the child was removed from Maryland to Michigan suggests that the appellant's custody rights were neither disputed nor unsettled. Moreover, the child was already living in Michigan at that time, and the distance between Maryland and Michigan is considerable even if it is less than the distance between Maryland and Quebec. In addition, the respondent admitted that it was only at the court's suggestion that she filed a petition to modify custody. In these circumstances, the respondent's arguments must be rejected.

5. Conclusion

Neither s. 3 nor s. 4 of the Act are applicable since the appellant had custody of the child within the meaning of the Act when she was removed and no proceedings for modifying that custody had been introduced. It follows that the trial judge had no jurisdiction to hear the appellant's motion for custody of the child under the Act and the Court of Appeal was, therefore, wrong to follow the trial judge on this issue.

II
Jurisdiction of the Superior Court and the Concept of Custody under the Civil Code of Québec

Having said this, the question that arises is whether the Superior Court of Quebec had jurisdiction to hear the appellant's motion for custody of the child under Quebec civil law. If so, the concept of custody within the meaning of the Civil Code of Québec will determine whether the trial judge was entitled to dismiss the appellant's motion and whether, in doing so, he took into account the child's best interests.

1. Jurisdiction of the Superior Court of Quebec

Article 70 C.C.P. makes the domicile of either of the parties the connecting factor for establishing the jurisdiction of Quebec courts to hear applications in family cases, including child custody cases (Groffier, supra , at p. 271). If recourse must be had to the Quebec conflict of jurisdictions rules applicable at the time, it is recognized that Quebec courts have jurisdiction to rule on child custody once the child is domiciled, resident or physically present in Quebec or the person who has control of the child resides in Quebec (J.-G. Castel, Droit international privé québécois (1980), at pp. 243-45; but see art. 3142 C.C.Q.).

The concept of domicile and the requirements for a change of domicile are defined in the Civil Code of Lower Canada , which was in force at the time of the relevant facts. According to arts. 79 and 83 C.C.L.C. respectively (now arts. 75 and 80 C.C.Q.), the domicile of a person is "at the place where he has his principal establishment" and that of a "minor whose custody has been the subject of a judicial decision . . . with the person who has custody of him". Moreover, art. 80 C.C.L.C. (now art. 76 C.C.Q.) provides that "[c]hange of domicile is effected by actual residence in another place, coupled with the intention of the person to make it the seat of his principal establishment".

The appellant moved from Michigan to Quebec on February 13, 1990, evidently with the intention of establishing himself and the child there near his sister, who already lived there. This intention is clear, inter alia , from the fact that, once in Quebec, the appellant applied for and obtained Canadian citizenship for himself and his daughter. Thus, when he made a motion to the Superior Court of Quebec for custody of the child on May 6, 1991, both he and the child were domiciled in Quebec, where they had resided for almost 15 months. In any event, even if the appellant's domicile is not established, the residence of the appellant and the child in Quebec is a sufficient basis for the Superior Court's jurisdiction according to Quebec conflict of jurisdictions rules. I therefore find that the trial judge had jurisdiction to hear and determine the appellant's motion for custody of the child.

A final issue that must be addressed concerns the Superior Court's power to order the return of the child in the instant case. In exercising its jurisdiction over custody, the Superior Court has the general powers conferred on it by art. 46 C.C.P. (Canadian Broadcasting Corp. v. Quebec Police Commission , [1979] 2 S.C.R. 618, at p. 644 (per Beetz J.)). This supplementary provision grants courts and judges "all the powers necessary for the exercise of their jurisdiction" and authorizes them, inter alia , to "make such orders as are appropriate to cover cases where no specific remedy is provided by law". The Superior Court's jurisdiction to order the return of the child in the instant case falls under these powers.

In passing, I observe that the origin of the Superior Court's general powers is unrelated to the concept of parens patriae jurisdiction conferred on superior courts of the provinces by the common law, as noted by R. P. Kouri in "L'arrêt Eve et le droit québécois" (1987), 18 R.G.D. 643, at pp. 648-49:

[TRANSLATION] [The parens patriae jurisdiction] was traditionally vested in the Lord Chancellor and was later assumed by the British Court of Chancery. In the Canadian common law provinces, the Judicature Acts provided that the superior courts had the same

powers as the Court of Chancery. Moreover, as we have already noted, these common law provinces each retained English law on their territory. Thus, the delegation of the parens patriae power to the superior courts of these provinces was clearly set out in legislation.

The situation is completely different in the province of Quebec, since our legislative development has not been the same. First of all, The Quebec Act reintroduced the civil-based law of the Ancien Régime and the 1793 statute on the judicature granted the Courts of King's Bench the powers of the courts of Prevoté , Justice Royale , Intendant and Superior Council. The legislature never conferred the powers of a Court of Chancery on the Court of King's Bench or its successor, the Superior Court. These courts have therefore never had the same jurisdiction as the Court of Chancery. Accordingly, in the province of Quebec the parens patriae prerogatives cannot be exercised by our courts but are vested exclusively in the Queen's representative, the Lieutenant Governor. [Footnotes omitted.]

Professor Michel Morin's exhaustive study, "La compétence parens patriae et le droit privé québécois: un emprunt inutile, un affront à l'histoire" (1990), 50 R. du B. 827, confirmed that the parens patriae jurisdiction does not exist in Quebec. Moreover, the author noted at pp. 901-2 that this jurisdiction is unnecessary in Quebec, inter alia in cases concerning children:

[TRANSLATION] [C]ivil law judgments have been able to take the child's interests into account without having to borrow from a foreign system of law. . . . Moreover . . . in private international law the use of the parens patriae jurisdiction in Quebec seems inadvisable. It adds superfluous criteria to the general provisions of the Civil Code and the Code of Civil Procedure . All things considered, we believe that judgments based on this uncertain concept duplicate what already exists in the civil law.

Contra : Droit de la famille -- 323 , [1988] R.J.Q. 1542 (C.A.). In any event, it is well settled that a court may exercise the parens patriae jurisdiction only in the absence of a specific statutory provision (E. (Mrs.) v. Eve , [1986] 2 S.C.R. 388, at p. 426 (per La Forest J.)), which is not the case here given art. 46 C.C.P. , to which I referred above.

Since I have found that the trial judge had jurisdiction to hear and determine the appellant's motion for custody of the child, provided that the judge applied the Quebec civil law concept of custody, it does not really matter that he relied on the Act in exercising this jurisdiction. From this perspective, it is helpful to review the concept of custody under the Civil Code of Québec .

2. Concept of Custody under the Civil Code of Québec

In Quebec, the concept of custody is included in the concept of parental authority, of which it is one of the main attributes under art. 647 C.C.Q. (now art. 599): "The father and mother have the rights and duties of custody, supervision and education of their children". This concept is not defined anywhere in the Civil Code of Québec , except that it comprises both rights and duties for parents, which give rise to a duty on the child's part to respect parental authority. Article 650 C.C.Q. (now art. 602) provides that "[n]o unemancipated minor may leave the family home without the consent of the person having parental authority".

As long as the parents live together, they both exercise all the attributes of parental authority, including the duties involved in custody. In the event of separation from bed and board or divorce, however, an award of custody to one of the parents or a third person authorizes that person to make all decisions in respect of the child. According to the Honourable Albert Mayrand, "La garde conjointe, rééquilibrage de l'autorité parentale" (1988), 67 Can. Bar Rev. 193, at p. 206, [TRANSLATION] "the custodian has the

initiative on his or her side; he or she exercises authority directly without having to rely on the court's authority or consult his or her former spouse".

The custodial parent's right to take the initiative and his or her decision-making autonomy are perfectly consistent with the logic behind the fundamental distinction between custody rights and access rights, a distinction upon which the respective roles of the custodial parent and the non-custodial parent are based. Thus, the non-custodial parent retains only a right to supervise the child, which may be exercised by means of the right to have access to the child and take the child out. This was stated as follows by the Honourable Robert Lesage in "Garde ou autorité parentale; l'emprise de la sémantique" (1988), 91 R. du N. 46, at p. 49:

[TRANSLATION] The non-custodial parent can become directly involved in day-to-day decisions concerning the child only within the limits of his or her access rights. He or she does not have custody. Access is not synonymous with alternating custody, even where the right to take the child out is broad . The custodial parent retains complete responsibility for the child's person. [Emphasis added.]

To the same effect, see E. Groffier-Atala, "De la puissance paternelle à l'autorité parentale" (1977), 8 R.G.D. 223, at p. 229; C. L'Heureux-Dubé, "La garde conjointe, concept acceptable ou non?" (1979), 39 R. du B. 835, at pp. 850-51.

Courts have expressed complete agreement with this view. In Dussault v. Ladouceur (1987), 14 R.F.L. (3d) 185 (Que. C.A.), Gendreau J.A. wrote the following at p. 191:

[TRANSLATION] It goes without saying that, as a general rule, when custody of a child is awarded to one parent, he or she then exercises all the attributes of parental authority and the other parent does not normally interfere with the custodial parent's approach except in performing his or her supervisory role. In this way, unity in the child's development is preserved and fragmentation and rifts that might be harmful to the child are avoided.

However, the non-custodial parent does not lose the status of a person having parental authority: he or she may and must continue to perform his or her duties of supervision and education in so far as this is not incompatible with the custodial parent's custody rights (P. (D.) v. S. (C.) , [1993] 4 S.C.R. 141, at p. 164 (per L'Heureux-Dubé J.); C. (G.) v. V.-F. (T.) , [1987] 2 S.C.R. 244, at pp. 281-82 (per Beetz J.)). This principle is also expressed as follows in art. 570 C.C.Q. (now art. 605): "Whether custody is entrusted to one of the spouses or to a third person, the father and mother retain the right of watching over the maintenance and education of the children, and are obliged to contribute thereto in proportion to their means".

The same is not true, however, for custody rights, the third component of parental authority. Mayrand, supra , stated the following at p. 196:

[TRANSLATION] [S]eparation or divorce makes it impossible for [the non-custodial parent] to discharge the duties of custody. As long as that parent is prevented from fulfilling his or her custody obligations, he or she is released therefrom; in family law as in property law, "no one is bound to do the impossible".

What impedes the exercise of his or her rights is the exercise of the same rights by the spouse or former spouse to whom the court has entrusted the child. [Footnote omitted.]

He adds at p. 206:

[TRANSLATION] To the extent that the non-custodial parent's parental authority is diminished and weakened, that of the person to whom the court awards custody is strengthened. His or her rights of custody, in the strict sense of the word, which were once shared with his or her spouse, become exclusive rights, except that he or she is normally subject to the right granted to the former spouse to visit the child and to have the child stay with him or her for limited periods.

More specifically, it is generally recognized that the concept of custody includes, inter alia , the right to determine the child's place of residence as a necessary attribute of custody. Mayrand, supra , stated this as follows at p. 195:

[TRANSLATION] [C] ustody may be defined as the right and duty of the father and mother to keep their minor child in their home or to determine the child's place of residence in order to properly carry out their duty to supervise and educate the child . [Emphasis in original.]

Along the same lines, Professor Monique Ouellette, Droit de la famille (3rd ed. 1995), at p. 224, expressed the opinion that [TRANSLATION] "[c]ustody rights presuppose that the parents 'physically' live with the child". Similarly, according to P. B. Mignault, Le droit civil canadien (1896), vol. 2, at p. 145, it is the parents [TRANSLATION] "who determine the type of education [the child] will receive and where [the child] must reside for his or her education or learning".

In this regard, the impact of awarding custody of a child to a third person was examined by this Court in C. (G.) v. V.-F. (T.) , supra , in which Beetz J. stated the following at pp. 285-86:

[S]omeone to whom a court awards the custody of a child clearly enjoys the exercise of part of the parental authority, which indeed surpasses the mere determination of the child's residence. . . . The civil law concept of custody necessarily includes the presence of the child. Accordingly, a minor whose custody is awarded to a third person acquires the domicile of that person (art. 83 C.C.L.C.) As Professor Simler correctly observes:

[TRANSLATION] The crux of the problem is the right to determine where the child lives. It is important to remember that though the concept of custody is not defined by this right alone, it is nevertheless this right that gives the person having custody the necessary means of performing his function. It is therefore inconceivable to speak of custody of a child in the absence of this element .

(P. Simler, "La notion de garde de l'enfant (sa signification et son rôle au regard de l'autorité parentale)" (1972), 70 Rev. trim. dr. civ. 685, at p. 708.) [Emphasis added by Professor Simler.]

Since Quebec civil law does not differentiate according to whether custody of a child is awarded to one of the child's parents or a third person (art. 570 C.C.Q. (now art. 605)), these comments apply to all custody awards.

However, the custodial parent's power to determine the child's place of residence remains subject to the right of the non-custodial parent, whether or not he or she has access rights, to challenge the exercise of that power by bringing an action under art. 653 C.C.Q. (now art. 604), which, "[i]n the case of difficulties relating to the exercise of parental authority", allows the non-custodial parent to refer the matter to the court. As Professor Jean Pineau stated in La famille -- Droit applicable au lendemain de la «Loi 89» (1983), at pp. 135-36:

[TRANSLATION] However, it must not be forgotten that the duties deriving from parental authority remain even where the exercise of such authority is dismembered. That is why, under article 215 [C.C.L.C. (now art. 605)], both the father and mother retain the right to watch over the maintenance and education of their children, regardless of who obtains custody of them. Accordingly, a problem may arise when one of the spouses decides to move abroad and that spouse has custody: in such a case, the other spouse, who can no longer exercise his or her right to watch over the child, might apply to the court for a new order granting him or her custody of the child . [Emphasis added.]

Thus, in some cases a change in the child's place of residence may be a new circumstance capable of justifying a modification of the custody order.

In summary, authors and the courts both affirm that the Civil Code of Québec has adopted a liberal concept of custody -- one that does not include access rights -- that gives the custodian the exclusive power to make all decisions in respect of the child, including the choice of the child's place of residence.

From a comparative perspective, it is interesting to note that the liberal concept of custody is also well established at the present time in divorce matters, as noted by J. D. Payne, Payne on Divorce (3rd ed. 1993), at p. 240:

In Canadian divorce proceedings, case law tends to support the conclusion that, in the absence of directions to the contrary, an order granting "sole custody" to one parent signifies that the custodial parent shall exercise all the powers of the legal guardian of the child. The non-custodial parent with access privileges is thus deprived of the rights and responsibilities that previously vested in that parent as a joint custodian of the child . [Emphasis added.]

According to the same author at pp. 242-43, this interpretation of custody rights remains the same under the Divorce Act, 1985 , S.C. 1986, c. 4 (now the Divorce Act , R.S.C., 1985, c. 3 (2nd Supp.)):

The provisions of the Divorce Act, 1985 , and particularly the definitions of "custody" and "accès" in section 2(1), may preclude Canadian courts from reverting to a narrow definition of custody . Pursuant to section 2(1), "`custody' includes care, upbringing and any other incident of custody" and "`accès' comporte le droit de visite." The use of the word "includes" in the definition of "custody" implies that the term embraces a wider range of powers than those specifically designated in section 2(1).... Consequently, in the absence of an order for shared parenting or a court-ordered division of the incidents of custody, a non-custodial spouse with access privileges would remain a passive bystander who is excluded from the decision-making process in matters relating to the child's welfare, growth and development. [Emphasis added.]

As is the case in Quebec civil law, it follows from this broad concept of custody that choosing the child's residence has been recognized to be a prerogative of the custodial parent, subject to the non-custodial parent's right to apply to the court to vary the terms and conditions of custody and access after the child is removed (s. 17(1) and (5) of the Divorce Act). This principle has been reiterated by the Quebec Court of Appeal a number of times in the context of the Divorce Act : Droit de la famille -- 120 , [1984] C.A. 101, at p. 104 (per Mayrand J.A.); Droit de la famille -- 7 , [1984] C.A. 350, at p. 354 (per Mayrand and Monet JJ.A., Bernier J.A. dissenting); Droit de la famille -- 190 , [1985] C.A. 201, at pp. 203-4 (per Chouinard J.A.); Droit de la famille -- 1826 , [1993] R.J.Q. 1728 (C.A.), aff'd [1995] 4 S.C.R. 592 (sub nom. P. (M.) v. L.B. (G.)). By way of example, in the last-mentioned case, the mother, who had custody rights, moved with the child from Quebec to

France in disregard of the father's access rights and of an agreement confirmed by a court order that prohibited such a removal. Although, in that specific case, the father was eventually awarded custody of the child, Proulx J.A. stated unequivocally that [TRANSLATION] "there is attached to the right of custody a right to decide where the child will live" (p. 1735).

Thus, the concept of custody under the Civil Code of Québec , as at common law and under the Divorce Act , cannot be distinguished from the concept of custody under the Convention and the Act. Since these different systems all give this concept a broad meaning that is distinct from access rights and that includes, inter alia , the right to choose the child's place of residence, it is of little consequence that the trial judge ruled on the appellant's motion for custody of the child under the Act rather than the Civil Code of Québec .

This brings us to the question whether, despite the fact that the trial judge took the wrong legal approach by applying the Act to the circumstances of the case at bar, he would have come to the same conclusion had he applied the Civil Code of Québec . From this perspective, it should be recalled that the interests of the child are the fundamental criterion in matters of child custody, which was the subject of the motion before the trial judge.

3. The Interests of the Child

As we know, the interests of the child are central to any decision concerning the child. This is the principle underlying the Convention and the Act. It is also the criterion adopted by the Civil Code of Québec , the courts and authors.

The primacy of the child's interests is recognized by the Convention's fundamental objective, which is confirmed in the Act and set out in the preamble to the Convention: "the interests of children are of paramount importance in matters relating to their custody". This objective is in keeping with the universal recognition that the interests of the child must prevail, as stated in a number of international documents in addition to the Convention, such as the Convention on the Rights of the Child , Can. T.S. 1992 No. 3, Article 3 of which provides that "[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration".

In the specific context of the removal or retention of a child in breach of custody rights, the Convention and the Act presume that the interests of the child lie in being promptly returned to his or her habitual place of residence for a determination on the merits of custody, where necessary. Thus, the interests of the child within the meaning of the Convention and the Act "should not be interpreted as giving a court seized with the issue of whether a child should be returned the jurisdiction to consider the best interests of the child in the manner the court would do at a custody hearing" (Thomson , supra , at p. 578 (per La Forest J.)). However, Article 13 of the Convention recognizes that, in certain clearly defined situations, the interests of the child before the court may on an exceptional basis justify not ordering the child's return (Schuz, supra , at p. 776). According to the Act, which is to the same effect, the Superior Court may refuse to order the return of the child for certain reasons, inter alia if it is demonstrated that the child is now settled in Quebec within the meaning of s. 20.

As with the concept of custody under the Convention and the Act, the best interests of the child also underlie the concept of custody under the Civil Code of Québec . The evolution of the concept of custody in Quebec, which I reviewed in detail in P. (D.) v. S. (C.) , supra , at pp. 156-59, shows that the child's best interests have been substituted for paternal authority, at pp. 158-59:

It can thus be seen that, at that time, paternal authority amounted, for all practical purposes, to a right of ownership of the father over the children. Later, in the fifties, the courts moved towards recognizing the rights of children over those of parents, although the father continued to be favoured. Little by little the criterion of the child's best interests emerged in custody decisions, a change that coincided with movements toward equality of the sexes.

. . .

Finally, on April 2, 1981, that part of the new Civil Code of Quebec altering existing family law came into effect. Not only are spouses now regarded as equal, but the best interests of the child henceforth govern the awarding of child custody.

In light of the evolution of custody rights in Quebec, which is similar to that of the common law in this regard (King v. Low , [1985] 1 S.C.R. 87, at p. 93 (per McIntyre J.)), it must now be determined what criterion applies when custody is awarded outside the context of divorce or separation from bed and board. The Divorce Act provides that in making a custody order, "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)). In the context of separation from bed and board, art. 569 C.C.Q. (now art. 514) requires the court to decide as to the custody of children "in their interest and in the respect of their rights".

The only criterion that governs decisions about a child in custody proceedings, as in any other proceedings concerning the child, is stated in art. 30 C.C.L.C. (now art. 33 C.C.Q.), which I have already quoted: "the child's interest and the respect of his rights".

In C. (G.) v. V.-F. (T.) , supra , which considered the conditions for awarding custody of a child to a third person in Quebec civil law, Beetz J., for the Court, stated the following about the scope of art. 30 C.C.L.C. , at p. 269:

The child's interest has become the cornerstone of decisions concerning it in Quebec civil law. The reform of family law introduced in 1980 by the adoption of the Act to establish a new Civil Code and to reform family law , S.Q. 1980, c. 39, has made the child's interest paramount. The rule that the child's interest must prevail was for the first time unequivocally recognized in the Civil Code with that reform. . . .

According to Beetz J., "[t]here can be no question that art. 30 C.C.L.C. applies to custody matters" (p. 271). Thus, as I wrote in P. (D.) v. S. (C.) , supra , at p. 174: "Accordingly, whether rights of custody or access are involved, the child's best interests as set out in art. 30 C.C.L.C. will be the sole guide ". (Emphasis in original.)

Authors and courts are unanimous in this regard. Professor Mireille D. Castelli, Le nouveau droit de la famille au Québec: projet de Code civil du Québec et Loi sur le divorce (1993), at p. 225, states that the only criterion that applies in custody matters is that of the child's interests, as set out in art. 33 C.C.Q. or, in the case of divorce, s. 16 of the Divorce Act . Professor Ouellette, supra , at pp. 225-26, noted that while the criteria for awarding custody to a parent are many and varied, [TRANSLATION] "[t]he entire process is concerned with the child's best interests, the only absolute criterion". More specifically, where a child is removed and a conflict of jurisdictions arises, it is recognized that, once the jurisdiction of Quebec courts to rule on the child's custody has been established, the court must be guided by the best interests of the child and must not concern itself with the law of the child's domicile (Castel, supra , at p. 245; Groffier, supra , at p. 144).

Given that the child's best interests are, therefore, the criterion governing custody awards, it must be determined whether the trial judge actually applied this criterion when he decided the appellant's motion for custody of the child.

4. Application to the Facts

As I stated above, it does not matter whether the judge considered the concept of custody under the Act rather than under the Civil Code of Québec , because in either case the concept is identical in that it is not to be confused with access rights only, particularly as regards the choice of the child's place of residence where there is no restriction in this regard in the custody order, as in the case at bar. Since it has been established that the appellant was free to move with the child, the only issue that the trial judge had to resolve under the Civil Code of Québec was whether it was in fact in the child's interests, following that move, to remain with her father in the circumstances disclosed by the evidence.

While the judge dismissed the appellant's motion for custody of the child on the basis of ss. 3 and 20 of the Act, he did in fact rule on the child's best interests. Although he felt that the only issue was whether the child was settled in her new environment, there is no doubt in my mind, based on the judgment and the judge's exhaustive analysis of the evidence after 14 days of proof and hearing, that he not only took account of the child's best interests but also determined that it was in her best interests to return to her mother.

The trial judge's consideration of the child's best interests is clear, for example, from his decision to allow evidence of the parties' relationship with the child before the time of the child's settlement in Quebec. Despite the appellant's objection in this regard, that evidence was relevant, in his view, to detect any risk of physical or psychological danger that might affect his decision about the child. Moreover, it was only after ensuring that the respondent would present no risk of physical or psychological harm to the child that the child was ordered to be returned to her.

The judge was unequivocal in expressing his conviction that the extreme fragility of the child's psychological condition was in large part due to the appellant's behaviour. He noted, for example, that "the child has no intimacy at all, being for example in obligation to write down her impressions after each visit with her mother in a document that is read by the father" (p. 120). Moreover, his conclusions about the child's psychological condition are also highly revealing: he described her as having a "false-self" and as being in a "straight [sic] jacket about to crack open", and he even went so far as to state that she was "on a sure road to mental illness, perhaps sooner than we think and that the damage is done" (p. 120). Thus, after 14 days of proof and hearing during which he had the incalculable advantage of seeing and hearing all the parties interested in the proceedings, including the child, as well as three expert witnesses, the judge concluded (at p. 120):

> **. . . this case is so bad that in all conscience I believe, even if this child is physically as free as a bird, that she lives in a subtle psychological jail weaved by a sincere and very intelligent father.**
>
> **I have to conclude that this child has been alienated and is in psychological danger. . . .**

At this point, it should be noted that great deference must be shown to the trial judge's findings of fact. It is well-settled case law that a court of appeal must not intervene in the trial judge's findings of fact unless the judge made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence or drew erroneous conclusions from it (P. (D.) v. S. (C.) , supra , at pp. 188-89 (per L'Heureux-Dubé J.)). Like the Court of Appeal, I find no such error by the trial judge in the case at bar. Accordingly, in light of

these findings of fact, which were undisputed in this Court, it seems to me that the trial judge correctly concluded that it was in the child's interests to order that she be returned to her mother.

In the final analysis, despite the fact that the arguments before the trial judge were made in the context of the Act and concerned a motion for custody of the child, they ultimately related to the child's best interests. Whatever the law he applied, the trial judge found, on the basis of complete evidence, that it was contrary to the child's interests to remain with the appellant. He therefore dismissed the appellant's motion and, as he had the authority to do in exercising his jurisdiction, ordered that the child be returned to the United States, first ensuring that her interests would be served by such an order. It must be noted that, on the date the judgment was rendered, the most recent judgment in Maryland concerning the child's custody was that rendered by the Circuit Court on May 8, 1990 (affirmed on May 14, 1991 by the Court of Special Appeals), which modified ex parte the original custody order in favour of the appellant and awarded custody to the respondent until arguments on the merits of custody could be heard. In this context, the order that the child be returned was in the nature of an interim order.

Since the judge ruled on the child's best interests in dismissing the appellant's motion, there is nothing to be gained from remitting the matter to the trial court for a determination on the merits of the child's custody, especially in view of the fact that the respondent did not request this in her conclusions in the Superior Court, the Court of Appeal or this Court and in view of the proceedings instituted in Maryland, where the child and her mother have returned.

V. Summary

Even though the parties admitted that the Act was applicable to the proceedings, the courts were not bound by that admission. In the case at bar, in light of the broad concept of custody recognized by the Convention and enshrined in the Act, the Act is not applicable. When the child was removed, the respondent had no rights of custody within the meaning of the Act and there were no proceedings for modifying the appellant's rights of custody, which had been awarded to him on a permanent basis.

Since the child was domiciled or resided with the appellant in Quebec, art. 70 C.C.P. and Quebec conflict of jurisdictions rules gave the Superior Court jurisdiction to hear and determine the appellant's motion for custody of the child. In this regard, the child's best interests were the only criterion that should have guided the court under art. 30 C.C.L.C. (now art. 33 C.C.Q.).

The fact that the trial judge dealt with the appellant's motion under the Act rather than the Civil Code of Québec is of no consequence. Both have adopted a broad concept of custody -- one that does not include access rights, inter alia in respect of the choice of the child's place of residence -- and the best interests of the child are the common standard. In the case at bar, the judge in fact determined that the child was at risk with her father by applying the test of the child's best interests. In addition, as he was authorized to do by art. 46 C.C.P. in exercising his jurisdiction over custody, the judge ordered that the child be returned to the United States after finding that her interests would be served by such an order.

In view of the deference that must be shown to the findings of fact by the trial judge, who heard all the interested parties and lengthy expert evidence, in view of the concept of custody under the Civil Code of Québec , which is similar to that under the Act, and in view of the criterion of the child's best interests, which in fact guided the judge in dismissing the

appellant's motion and ordering that the child be returned to the United States, the trial judge's decision must be affirmed.

VI. Disposition

Although for different reasons than those given by the Court of Appeal, I am of the view that the disposition in the Superior Court's judgment was correct. Accordingly, I would dismiss the appeal with costs.

The following are the reasons delivered by

SOPINKA J. -- I agree with L'Heureux-Dubé J., subject to the reservation expressed by McLachlin J.

The following are the reasons delivered by

CORY J. -- I agree with L'Heureux-Dubé J., subject to the reservation expressed by McLachlin J.

Appeal dismissed with costs.

Solicitor for the appellant: Ghislain Richer, Sherbrooke.

Solicitors for the respondent: Laroche Alric, Sherbrooke.

Solicitors for the mis en cause Blais: Lecompte, Allaire & Chiasson, Sherbrooke.

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