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The Power of the Supreme Court of Canada in Advancing Children's Rights

In our work, we have found that one of the most powerful and far-reaching ways to create change in the area of children's rights is through acting as Intervenor in cases before the Supreme Court of Canada. The Supreme Court decisions create precedents not only for subsequent legal decisions in Canada but may affect other countries that are signatories to the same international Agreements.

In a recent case before Supreme Court of Canada, DCI-Canada was granted Intervener status in a case that looked at the connection between the UN Convention on the Rights of the Child and the Hague Convention. We were particularly concerned that Article 12 of the Convention be recognized in any decision of the Court. This is the Article that speaks to the right of the child to be heard in all matters affecting the child. It also speaks to taking into account the age and maturity of the child rather than establishing a fixed age.

The decision of the Supreme Court was remarkable and will change the analysis under the *Hague Convention* in Canada and perhaps in other countries who are signatories to that Convention as well. Now the Court cannot just consider "parental intention" when determining habitual residence under the Hague Convention. The Supreme Court of Canada has determined that a hybrid model must be employed in Canada which means that the Court cannot just focus on parental intention and instead must focus on all of the relevant considerations arising from the facts of the case including the child's circumstances, the child's links to the country, nationality, duration, conditions and reasons for the child's stay in the country.

Further, the Court found that the child's objections to a return should be assessed in a straightforward fashion, without the imposition of formal conditions or requirements not set out in the text of the Hague Convention.

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17064/index.do>

DCI-Canada was granted intervenor status on a second case involving an individual who was being held in immigration detention. He had been convicted in several criminal offenses and was scheduled to be deported to Pakistan. That country refused to accept him indicating that they had no record of citizenship and Canada refused to release him to the community because of his criminal activities. He made application for *habeas corpus* on the basis that his detention was continuing, lengthy and of uncertain duration and therefore was illegal. DCI sought intervenor status on the basis that children could be impacted by the decision of the Court, including children in uncertain immigration detention or children not in detention but who were deprived of a parent or sibling in immigration detention. The decision of the Court was that an application for *habeas corpus* would be allowed. This was an important decision for the protection of children, particularly children held in indeterminate detention because of the status of their parent(s). It also provides a remedy for children involved in immigration matters when no other legislation protects them. This decision is important for our work regarding the report on the *Global Study of Children Deprived of Liberty*.

A third case where DCI-Canada has been granted intervenor status involved a family living in the United Arab Emirates where the mother and two young children are Canadian citizens. The mother brought the children to Canada for a visit and then indicated that neither she nor the children would be returning to the UAE. The father opposed her decision and sought to have the children returned to UAE where custody and access issues would be heard before a court in that country on the basis that UAE was the family's place of habitual residence as outlined in the Hague Convention. The Ontario Court of Appeal declined jurisdiction to hear the case and ordered the children to be returned to the UAE. The case before the Supreme Court of Canada was whether the Ontario Court of Appeal erred in declining to hear the case in Ontario and decide the custody and access issues in a Canadian court.

This was a very complicated case with issues of "best interests", serious harm to the children if they were moved from Ontario or separated from their mother, and the difference in how different jurisdictions might consider children's rights.

Very different views were presented to the Court. In the end the decision was split with the majority of the Justices indicating the Ontario Court of Appeal had not erred in its decision and the issue of parental custody and access should be decided in the UAE.

Canada ratified the UN Convention on the Rights of the Child in 1991 but the development of domestic legislation to implement the Convention has lagged far behind. Decisions by the Supreme Court of Canada are powerful incentives to develop legislation, policies and actions to protect Canada's children.

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