5.10 Parental Child Abduction

Public Prosecution Service of Canada Deskbook

Directive of the Attorney General Issued under Section 10(2) of the Director of Public Prosecutions Act

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1. Introduction

Parental child abduction occurs when one parent, without either legal authority or the permission of the other parent, takes a child from the parent who has lawful custody. There may be both international and domestic aspects to child abduction. Although children may not be in physical danger, their lives are nevertheless greatly disrupted. They are deprived by the abducting parent of security, stability and continuity in their lives. The purposes of ss. (sections) 282 and 283(1) (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html) of the Criminal Code are to prevent such outcomes and to encourage parents to settle child custody and access issues in court and to abide by any court orders that are made. [1]

Section 282 of the Criminal Code prohibits parental child abductions in situations where there is a custody order made by a Canadian court. Section 283 applies to situations where parents continue to have joint custody of their child by operation of law, where there is a written agreement, where there is a foreign custody order, or where the abducting parent did not believe or know there was a valid custody order.

The Ontario Court of Appeal in R v McDougall (1990) 62 CCC (Criminal Code of Canada) (3d) 174 (https://www.canlii.org/en/on/onca/doc/1990/1990canlii6788/1990canlii6788.html) at 189 cautioned that:

> The offence created by s. (section) 282 is a grave one and is intended to strike at conduct in the nature of child abduction. Care must be taken before a prosecution is launched under s. (section) 282 to ensure that the events complained of truly amount to criminal conduct. This care is evidenced by the requirement in s. (section) 283 (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html) (a companion section to s. (section) 282 (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html)) that the Attorney General or counsel instructed by him consent to proceedings under that section. It is very common in custody and access disputes that each parent feels terribly wronged and makes the most serious allegation against the other ….Criminal prosecutions cannot become a weapon in the arsenal of parties to acrimonious family disputes.

In October of 1998, the Federal/Provincial/Territorial Ministers responsible for Justice adopted model charging guidelines for use by police and Crown counsel to assist in the uniform application of the Criminal Code (http://laws-lois.justice.gc.ca/eng/acts/C-46/index.html) provisions and in particular in deciding when and how charges may be laid. The guidelines remain advisory only,

since the decision on charging rests with investigative agencies and ultimately with Crown counsel. This directive reflects the principles set out in the model guidelines.

2. Statement of Policy

The Criminal Code (http://laws-lois.justice.gc.ca/eng/acts/C-46/index.html) provisions send a clear message that unilateral actions by one parent that affect lawful care and control rights of the other parent respecting the child will not be tolerated. Such actions have a detrimental effect on the well-being of the children involved. Parents are to be discouraged from using “self-help” remedies to deal with custody disputes. Parents are to be encouraged to comply with existing orders or agreements and to resolve disputes with the other parent through civil processes.

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Not all cases of parental child abduction will warrant criminal charges. As with any decision to prosecute, in addition to assessing the reasonable prospect of conviction, Crown counsel must consider whether a prosecution is in the public interest. [2] Civil enforcement is another route that can be used as an alternative to the criminal response when criminal charges are not appropriate.

The federal Family Orders and Agreements Enforcement Assistance Act (http://laws-lois.justice.gc.ca/eng/acts/F-1.4/index.html) establishes procedures to ascertain the addresses of parents and children residing in Canada from federal information banks to facilitate the enforcement of custody orders.

The Hague Convention on the Civil Aspects of International Child Abduction (http://www.hcch.net/index_en.php?act=conventions.text&cid=24) (the Hague Convention), which has been adopted by all Canadian jurisdictions, is the main international treaty that can assist parents whose children have been abducted to another country.

Article 3 (http://www.hcch.net/index_en.php?act=conventions.text&cid=24) of the Hague Convention states in part:

> The removal or the retention of a child is to be considered wrongful where:
>
> 1. 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
> 2. 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.

Article 5 (http://www.hcch.net/index_en.php?act=conventions.text&cid=24) of the Hague Convention states in part:

> For the purposes of this Convention
>
> a. “rights of custody” shall include rights relating to the care of the child and, in particular, the right to determine the child's place of residence;

In addition, each jurisdiction should ensure the police, Crown counsel and others dealing with s. (section) 282 and s. (section) 283 (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html) of the Criminal Code are provided with information on the role of, and how to contact, the Central Authority for the Hague Convention in their jurisdiction. [3] There may be civil proceedings for the return of the child underway or available under the Hague Convention. Crown counsel should consult with the Central Authority in their province/territory as international cooperation may be facilitated by understanding the relationship between civil and criminal actions.

3. Where Charges Warranted

Given the significance of charging a parent with abducting his or her child, Crown counsel must consult with their Chief Federal Prosecutor before proceeding. Additionally, consent of the Attorney General is a statutory prerequisite to commencing a prosecution under s. (section) 283(1) (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html). This consent power may be exercised by the Director of Public Prosecutions (DPP (Director of Public Prosecutions)) and a Deputy DPP (Director of Public Prosecutions) [4] as lawful deputies of the Attorney General.

The offence under s. (section) 282 and s. (section) 283 (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html) apply only where children under the age of 14 are involved.

3.1. Abduction in contravention of a custody order (section 282 of the Criminal Code)

Charges under s. (section) 282(1) (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html) of the Criminal Code may be warranted where:

1. A child under the age of 14 is involved; and
2. There is a court order establishing “custody rights” granted in Canada which is not being complied with.

To establish an offence under s. (section) 282 (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html), the evidence must demonstrate that:

a. the alleged abductor
   i. is a parent, guardian (as defined in s. (section) 280(2) (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html)) or other person having the lawful right to care for or charge of a child;
   ii. takes, entices away, conceals, detains, receives or harbours the child;
   iii. is in contravention of the custody provisions of a Canadian custody order; and
   iv. intended to deprive the parent, guardian or person having lawful care or charge of the child of possession of the child contrary to a court order.
b. The parent, guardian or other person whom the alleged abductor intended to deprive of possession of the child did not consent to the taking, of the child by the alleged abductor (see s. (section) 284 (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-150.html)); and
c. There is no reason to believe that the alleged abductor did not know of the existence or terms of the custody order.

In considering whether charges are warranted, Crown counsel must keep the following in mind:

1. Persons can have different types of “custody rights” under custody orders. For example, an order may grant a person sole

custody, joint custody, periods of care and control (with custody remaining joint between the parents by virtue of provincial legislation) or guardianship. These are all types of "custody rights."
2. There may be no reasonable prospect of conviction: (a) where the order is not clear on its face as to the terms of custody allegedly breached and the available evidence does not clarify the nature of the breach; or (b) where there are competing interim or final orders issued by different courts dealing with the custody of a child, which are both valid on their face.
3. It is not necessary to register an order of custody granted in one province before criminal charges can be laid in another. The investigating agency must be advised to ascertain whether the custody order relied upon is the most current order and is still in effect. The agency must obtain a copy of the order. This can be done by asking the complainant, calling the registrar/court staff where the order was issued, or otherwise.

3.2. Abduction in absence of a Canadian custody order (section 283 of the Criminal Code)

No proceedings may be commenced under s. (section) 283(1) (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html) of the Criminal Code without the consent of the Attorney General or counsel instructed by him or her for that purpose is obtained. Under the Director of Public Prosecutions Act (http://laws-lois.justice.gc.ca/eng/acts/D-2.5/page-1.html), the DPP (Director of Public Prosecutions) and Deputy DPP (Director of Public Prosecutions)'s are lawful deputies and may consent on behalf of the Attorney General. [5] The fact that consent has been given may be added to Informations under s. (section) 283(1) (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html), as follows: "The Consent of the Director of Public Prosecutions and Deputy Attorney General of Canada (or Deputy Director of Public Prosecutions) has been obtained to lay this charge."

Charges under s. (section) 283(1) (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html) may be warranted where:

1. A child under 14 is involved; and
2. One of the following scenarios exists:
    a. A Canadian custody order exists but the alleged abductor was unaware or did not believe that there was a valid order (see s. (section) 282(2) (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html));
    b. No Canadian custody order exists, but parental rights of custody under statute or common law exist (e.g. (exempli gratia) provincial family law legislation may indicate that parents have joint custody of their children unless the court orders otherwise);
    c. No Canadian custody order exists, but custody rights under a separation agreement or a foreign order have been violated. Where the rights of the access parent are not so extensive, resort should be made to civil remedies;
    d. There has been a permanent or indefinite denial of a right or access pursuant to an agreement that provides the access parent with a significant degree of care and control over a child with or without a provision permitting the child's removal

    from the jurisdiction. Where the rights of the access parent are not so extensive, resort should be made to civil remedies; or
    e. There has been a permanent or indefinite denial of right of access pursuant to a court order, which provides the access parent with a significant degree of care and control over a child. Where the rights of the access parent are not so extensive, resort should be made to civil remedies, which exist in the jurisdiction.

To establish an offence under s. (section) 283 (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html), the evidence must demonstrate that:

1. The alleged abductor
    a. is a parent, guardian (as defined in s. (section) 280(2) (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html)) or other person having the lawful right to care for or charge of a child;
    b. takes, entices away, conceals, detains, receives or harbours the child;
    c. intended to deprive the parent, guardian or person having lawful care or charge of the child of possession of the child; and
    d. the parent, guardian or other person whom the alleged abductor intended to deprive of possession of the child did not consent to the taking of the child by the alleged abductor (see s. (section) 284 (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-150.html) below).

4. The Public Interest

On charge assessment for alleged offences under s. (section) 282(1) or s. (section) 283(1) (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html), the factors to be considered in deciding whether a prosecution best serves the public interest are described in the PPSC (Public Prosecution Service of Canada) Deskbook guideline "2.3 Decision to Prosecute (../p2/ch03.html)", but also include the following factors that are specific to this type of a prosecution.

4.1. Factors or circumstances favouring prosecution

1. A child has been taken from a situation where there has been some degree of permanency, contrary to a settled (written or otherwise) or ongoing arrangement.
2. Custody proceedings have been initiated or are anticipated, and the alleged abductor, in taking the child, is frustrating the proceedings. This may include, but is not restricted to, situations in which the court has stated that, pending a determination, the child is not to be removed from the jurisdiction.
3. There are reasonable grounds to believe that one parent has a foreign custody order and the alleged abductor is in breach of that order.

4. The child has been taken by the alleged abductor contrary to existing custody rights and a criminal charge is necessary to ensure protection of the child.
5. The alleged abductor takes the child surreptitiously and disappears with the child.
6. The alleged abductor takes the child where there is a provision in an order or agreement restricting the ability of a parent to remove the child from the jurisdiction.
7. The alleged abductor takes the child and in so doing has permanently or indefinitely frustrated the other parent's rights, where such rights by their nature involve a significant degree of care and control over the child.
8. The offending party has previously breached ss. (sections) 282(1) or 283(1) (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html).
9. There are reasonable grounds to believe that the offending party is incapable of looking after the child (e.g. (exempli gratia) due to substance abuse or diminished capacity).

4.2. Factors or circumstances weighing against prosecution

1. A less onerous civil remedy is available and would be more appropriate in the circumstances.
2. The offending parent is merely late in returning a child from an access visit.
3. Although technically possible, a charge would not likely be laid in circumstances in which one party moves out of the home with the child while in the course of separating from the other party, if it appears that the parties are attempting to resolve custody either through the courts or by agreement.

5. Defences

1. It is a defence if the alleged abductor establishes that the taking of the child was done with the consent of the parent, guardian or other person having the lawful possession, care or charge of the child (s. (section) 284 (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-150.html)). However, the alleged abductor's consent is not sufficient for this defence.
2. It is a defence:
   a. if the child was taken to protect the child from danger of imminent harm; or
   b. if the alleged abductor was fleeing from imminent harm and taking the child as well. For example, protecting a child from child abuse would be a defence as would a parent escaping from a situation of spousal assault and removing the child at the same time (s. (section) 285 (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-150.html)).
3. It is not a defence to any charge under ss. (sections) 282 and 283 (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-149.html) that the young person consented to or suggested any conduct of the accused (s. (section) 286 (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-150.html)).

Footnotes

1 Only the PPSC (Public Prosecution Service of Canada)'s Northern offices handle parental child abduction prosecutions under ss 282 and 283 of the Criminal Code.

2 See the PPSC (Public Prosecution Service of Canada) Deskbook guideline "2.3 Decision to Prosecute (../p2/ch03.html)".

3 The current contact information for the federal government Central Authority, as well as the provincial and territorial Central Authorities, can be found on the Hague Conference on Private International Law website (http://www.hcch.net/index_en.php?act=authorities.details&aid=75).

4 See Annex B of the PPSC (Public Prosecution Service of Canada) Deskbook guideline "3.5 Delegated Decision-making (../p3/ch05.html)" which specifies that these decisions regarding consent can be made by the DPP (Director of Public Prosecutions) or a Deputy DPP (Director of Public Prosecutions).

5 Ibid. (ibidum)

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