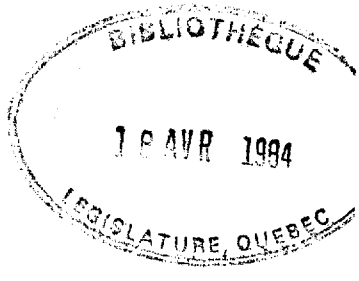
# NATIONAL ASSEMBLY

FOURTH SESSION THIRTY-SECOND LEGISLATURE

# Bill 72

## An Act respecting the civil aspects of international and interprovincial child abduction

**Introduction**




**Introduced by**
**Mr Pierre Marc Johnson**
**Minister of Justice**

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EXPLANATORY NOTES

*The object of this bill is to ensure that the principles and rules set forth in the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 are applied in Québec. It also permits the Government to extend the application of those principles and rules, on a basis of reciprocity, to any State, province or territory designated by order.*

*The bill aims to secure the return as promptly as can be of children wrongfully removed or retained to their former place of residence, without attempting to settle the issue of custody rights, in order to bring about a rapid return to the status quo before the wrongful removal or retention. It also aims to ensure that rights of access are respected.*

*The bill designates the Minister of Justice as the Central Authority responsible for the application of the Act. Consequently, the Minister will assume in Québec, either directly or through other authorities, various administrative duties, in particular, the transmission of applications to other Central Authorities, the discovery of the whereabouts of children, the taking of provisional measures, the negotiation of an amicable resolution of the issues between the conflicting parties and the institution of judicial proceedings, if required.*

*The bill designates the Superior Court as the competent judicial authority for the purposes of application of the Act. The Superior Court will have, in particular, power to order the return to their habitual residence of children wrongfully removed or retained in Québec, to force persons to divulge information as to the whereabouts of such children and to order a child brought before the Director of Youth Protection for a decision on the appropriate provisional measures.*

# Bill 72

An Act respecting the civil aspects of international and interprovincial child abduction

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:

## CHAPTER I

### INTERPRETATION AND APPLICATION

**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) "designated State" means a State, a province or a territory designated under section 41.

**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.

**5.** This Act shall apply to any child under sixteen years of age who was habitually resident in Québec or in a designated State immediately before any breach of custody or access rights. In all cases it shall cease to apply when the child attains sixteen years of age.

**6.** For the purposes of this Act, the Minister of Justice is the Central Authority for Québec, and in a designated State the Central Authority is the authority appointed by that designated State. Furthermore, the Superior Court is the competent judicial authority for Québec.

## CHAPTER II

### CENTRAL AUTHORITIES

**7.** The Minister of Justice shall co-operate with the Central Authorities of the designated States and promote cooperation amongst the competent authorities in Québec to achieve the objects of this Act.

**8.** The Minister of Justice, either directly or through any intermediary, shall take all appropriate measures

(1) to discover the whereabouts of a child who has been wrongfully removed or retained;

(2) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

(3) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

(4) to exchange, where desirable, information relating to the social background of the child;

(5) to provide information of a general character as to the law of Québec in connection with the application of this Act;

(6) to initiate or facilitate the institution of judicial proceedings for the purposes of the application of this Act;

(7) to provide, or in certain cases, facilitate the provision of legal aid;

(8) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

(9) to keep the Central Authorities of the designated States informed with respect to the operation of this Act and, as far as possible, to eliminate any obstacles to its application.

The Minister of Justice and the competent authorities responsible for the application of this Act shall act expeditiously in taking the measures provided for in this section.

**9.** The Attorney General or a person designated by him may address a motion to a judge of the Superior Court or, in the absence of a judge responsible for rendering justice, to a prothonotary, for the purpose of ordering a person to furnish to the applicant the information in his possession and permitting, if need be, that that person be interrogated before the prothonotary as to the whereabouts of the child or the person with whom the child might be.

This section applies notwithstanding the provisions of the Act respecting Access to documents held by public bodies and the Protection of personal information (1982, chapter 30) and any inconsistent provision of any general law or special Act providing for the confidentiality or non-disclosure of certain information or documents. However, it does not apply to a person who has received the information in the exercise of his profession and who is bound by professional secrecy towards the child or the person with whom the child might be.

**10.** On a motion by the Attorney General or a person designated by him, a judge of the Superior Court may issue a warrant ordering a peace officer to make the necessary inquiries in view of discovering the whereabouts of a child and take him without delay before the director of youth protection having jurisdiction in the district where the child is in order that the director exercise his responsibilities under the first paragraph of section 11.

**11.** The case of a child contemplated in an application may be referred to a director of youth protection to allow him to take, in respect of that child, the required urgent measures, to see, as the case may be, to the application of voluntary measures he recommends and to undertake negotiations in view of the voluntary return of the child.

In no case may the director apply the urgent measures for longer that forty-eight hours unless authorized to do so by a judge of the Superior Court on the conditions he indicates.

**12.** This chapter also applies to secure the peaceful enjoyment of access rights and the fulfilment of any conditions to which those rights may be subject and to remove, as far as possible, all obstacles to the exercise of such rights.

## CHAPTER III

### RETURN OF THE CHILD

#### DIVISION I

##### APPLICATION TO THE CENTRAL AUTHORITY

**13.** Any person claiming that a child has been removed or retained in breach of custody rights may apply either to the Minister of Justice or to the Central Authority of a designated State for assistance in securing the return of the child.

**14.** The application shall contain

(1) information concerning the identity of the applicant, of the child and of any person alleged to have removed or retained the child;

(2) where available, the date of birth of the child;

(3) the grounds on which the applicant's claim for return of the child are based;

(4) a written authorization giving the Central Authority the power to act on behalf of the applicant or to designate a representative to act in his name;

(5) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

**15.** The application may be accompanied or supplemented by

(1) an authenticated copy of any relevant decision or agreement;

(2) a certificate or an affidavit emanating from the Central Authority or another competent authority of Québec or of the designated State of the child's habitual residence, or from a qualified person, concerning the relevant law in the matter;

(3) any other relevant document.

**16.** When it is manifest that the requirements of this Act are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

**17.** If the Minister of Justice, after an application has been referred to him, has reason to believe that the child is in a designated State, he shall directly and without delay transmit the application to the Central Authority of that State and inform the requesting Central Authority, or the applicant, as the case may be.

## DIVISION II

### JUDICIAL PROCEEDINGS

**18.** In order to obtain the forced return of a child, the Minister of Justice or the person claiming that there has been a breach of custody rights shall make an application by way of a motion to the Superior Court of the place where the child is or of another appropriate place according to the circumstances.

The application is subject to the rules set forth in the Code of Civil Procedure (R.S.Q., chapter C-25) in respect of motions based on Book Two of the Civil Code, to the extent that those rules are consistent with this Act.

**19.** Any judicial proceedings for the return of a child have precedence over all other matters as provided in article 861 of the Code of Civil Procedure (R.S.Q.,chapter C-25) for *habeas corpus* proceedings.

**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.

**21.** The Superior Court may refuse to order the return of the child if the person who opposes his or her return establishes that

(1) the person 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

(2) 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.

**22.** The Superior Court may also refuse to order the return of the child if

(1) 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 his or her views;

(2) the return is contrary to the human rights and freedoms recognized in Québec.

**23.** In considering the circumstances referred to in sections 21 and 22, the Superior Court shall take into account, in particular, the information relating to the social background of the child provided by the Central Authority or other competent authority of the designated State in which the child is habitually resident.

**24.** Where the Superior Court has reason to believe that the child has been taken from Québec, it may stay the proceedings or dismiss the application for the return of the child.

**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.

**26.** The sole fact that a decision relating to custody has been given in or is entitled to recognition in Québec shall not be a ground for refusing to order the return of a child, but the Superior Court may take account of the reasons for that decision which are relevant to the application of this Act.

**27.** If the Superior Court has not reached a decision within six weeks from the date of commencement of the judicial proceedings, the Minister of Justice shall indicate, if he is so required by the applicant or the requesting Central Authority, the reasons for the delay.

**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.

**29.** The Superior Court, before ordering the return of a child, may request that the applicant produce a decision or attestation from the authorities of the designated State in which the child is habitually resident that the removal or retention was wrongful, where such a decision or attestation may be obtained in that State.

The Superior Court may, upon the motion of an applicant wishing to obtain the return of a child to Québec, issue an attestation stating that the removal or retention was wrongful. The Minister of Justice shall so far as practicable assist applicants to obtain such an attestation.

**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.

## CHAPTER IV

### RIGHTS OF ACCESS

**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.

Section 18 applies if the proceedings consist of an application addressed to the Superior Court.

## CHAPTER V

### MISCELLANEOUS PROVISIONS

**33.** This Act shall not preclude any person who claims that there has been a breach of custody or access rights from applying directly to the Superior Court or to the judicial or administrative authorities of any designated State, whether or not under the provisions of this Act, except section 10.

**34.** Any application submitted to the Minister of Justice or to the Central Authority of a designated State or directly to the Superior Court or the judicial or administrative authorities of a designated State in accordance with the terms of this Act, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the Superior Court.

**35.** No security shall be required to guarantee the payment of costs and expenses in the judicial proceedings falling within the scope of this Act.

**36.** No legalization or similar formality may be required for the application of this Act.

**37.** Nationals of a designated State and persons who are habitually resident in that State shall be entitled, in matters concerned with the application of this Act, to legal aid in Québec as provided in the Legal Aid Act (R.S.Q.,chapter A-14).

**38.** No charge shall be required from the applicant in relation to proceedings instituted under this Act.

Notwithstanding the foregoing, the Minister of Justice may require the applicant to pay the expenses incurred or to be incurred in implementing the return of the child. The applicant is also required to pay, subject to section 37, court costs as well as costs arising from legal aid or legal representation.

**39.** Upon ordering the return of a child or issuing an order concerning rights of access under this Act, the Superior Court may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, the costs of legal representation of the applicant, and those of returning the child, and any costs incurred or payments made for locating the child.

**40.** This Act does not preclude the implementation of conventions or agreements between a designated State and Québec or of other provisions of Québec law, particularly to obtain the return of a child wrongfully removed or retained, to organize rights of access or to extend the scope of this Act to include any child under eighteen years of age.

The conventions, agreements or other provisions referred to in the first paragraph may provide for more favorable conditions for the return of a child than are provided in this Act.

## CHAPTER VI

### FINAL PROVISIONS

**41.** The Government, upon the recommendation of the Minister of Justice and, as the case may be, of the Minister responsible for Canadian Intergovernmental Affairs or the Minister of International Relations, shall designate by order any State, province or territory in which he considers that Québec residents may benefit from measures similar to those set out in this Act.

The order shall indicate, in particular, the date of the taking of effect of this Act for each State, province or territory designated in it and shall be published in the *Gazette officielle du Québec.*

**42.** The Government may make any expedient regulation for the administration of this Act.

Such a regulation shall come into force ten days after its publication in the *Gazette officielle du Québec* or on any later date indicated therein.

**43.** This Act applies only to wrongful removals or retentions which occurred after its taking of effect in respect of the designated State concerned.

[[**44.** The sums required for the implementation of this Act are taken from the appropriations granted annually for such purpose by Parliament.]]

**45.** The Minister of Justice is responsible for the administration of this Act.

**46.** This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B of the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom).

**47.** This Act comes into force on the date fixed by proclamation of the Government, except the provisions excluded by the proclamation, which will come into force on any later dates fixed by proclamation of the Government.