Interprovincial Enforcement of Non-Money Judgements 1996

- **1996 Ottawa, ON**
  Civil Section Documents - The Interprovincial Enforcement of Non-Money Judgements

A. Introduction

Recent judgments of the Supreme Court of Canada[1] have given judicial weight to the view that it is not appropriate to regard different provinces within a federal arrangement as truly distinct international entities.[2] There are at least two related foundations to this argument. First, to maintain obstacles to enforcement of judgments and the flow of capital and labour across provincial boundaries is not in the spirit of federalism. Second, the common law provinces share a common legal heritage, and to look on a judgment of another superior court with the same distrustful eye that one looks at a judgment of a truly foreign court denies this common heritage.

These developments have occurred in the context of the enforcement of money judgments between Canadian provinces and they have stimulated a number of responses. Perhaps the most significant of these was the development, by the Uniform Law Conference of Canada, of the Uniform Enforcement of Canadian Judgments Act [UECJA] which was settled in 1991. Work on it actually pre-dated the decision in Morguard[3] but that decision highlighted the necessity of developing rational uniform legislation in this area. Briefly stated, UECJA provides a mechanism under which a court in one province may register a judgment for a defined sum of money rendered by a court of another province, allowing the court in the registering province to treat the judgment as its own. This relieves the judgment creditor of many of the legal hurdles that would be confronted had the judgment been enforced by a fresh law suit on it.

The UECJA was drafted to apply solely to final judgments that required the payment of money. Section 2 (1) of the Act says that "a Canadian judgment for the payment of money may be registered under this Act for the purpose of enforcing payment of the money...." Subsection (2) allows the money provisions of a judgment to be separated from non-money provisions in order to be registered. Clearly excluded from these provisions is the application of a registration and enforcement scheme to judgments that do not require a person to pay money, but require the person to do or not to do some act. This reading is confirmed by the Official Comment to s. 2: "Only judgments for the payment of money may be registered."[4]

The arguments and policies which support the creation of machinery to facilitate the enforcement of money judgments between Canadian provinces also have force in the context of non-money judgments. This report is concerned with the feasibility of developing a Uniform Act which achieves, in the realm of non-money judgments, what UECJA achieves in relation to money judgments.

B. Is a scheme for the interprovincial enforcement of non-money judgments appropriate?

The law has experience over the centuries of enforcing judgments for money that emanate from the courts of other states. The creation of modern legislation for the

interprovincial enforcement of money judgments, therefore, was not perceived as some new and radical measure. The development of the UECJA was simply the most recent step in an evolutionary process which allows us to do better and more efficiently things we have always been able to do.

A scheme for the interprovincial enforcement of non-money judgments would have roots and antecedents of its own but they are much less obvious. Such a scheme is much more likely to be perceived as a significant break with the past and might, perhaps, meet resistance for that reason. In making the case for change, if it can be demonstrated that a scheme for the interprovincial enforcement of non-money judgments has doctrinal roots of its own, and is consistent with other contemporary legal developments, the possibility of its acceptance should be greatly enhanced. Some factors that support the creation of such a scheme are set out below.

1. The Morguard Decision

While Morguard was concerned with a judgment for money, the principles stated in it are broad enough to embrace non-money judgments. LaForest J. observed: [5]

As I see it, the courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action. ... It seems both archaic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province. Why should a plaintiff be compelled to begin an action in the province where the defendant now resides whatever the inconvenience and costs this may bring and whatever degree of connection the relevant transaction may have with another province? And why should the availability of local enforcement be the decisive element in the plaintiff's choice of forum?

These comments apply with equal force to a proceeding where non-money relief, such as an injunction, is claimed.

2. An equitable jurisdiction to enforce non-money judgments may exist

This ancient practice of suing on a foreign judgment as a debt arose before the jurisdictions of the common law courts and the Courts of Chancery were combined by the Judicature Acts. The rules limiting the common law courts to granting money remedies caused them to only be able to treat foreign judgments as debts, and this limitation appears to have persisted to this day. However, there may be equitable jurisdiction to enforce foreign non-money orders[6], though it does not have appeared to have been exercised since the implementation of the Judicature Acts.

In Morgan's Case[7] the English Chancery Court enforced a decree issued in a Welsh court (before England and Wales became one juridical district) requiring the payment of a legacy: "[T]he bill having stated the will, and all the proceedings in Wales, &c., for the recovery of the legacy, an original independent decree might be had in this court for the legacy...." [8]

In Houlditch v. Marquis of Donegal [9], the Marquis' creditors obtained orders against him in the English Chancery Court, enjoining him from collecting rent from his Irish lands and appointing a receiver. The Irish Lord Chancellor said that he could not enforce the English orders in Ireland. His decision was overturned by the House of

Lords, who said that the plaintiffs had an action on the order in Chancery Court just as a judgment-creditor has an action in debt.

It is questionable how these authorities stand today. Neither are mentioned in Halsbury's in this context[10]. The equitable principle they supposedly stand for was missed by the Lord Chancellor in Re Dundee and Suburban Ry. Co.[11] where the court said there was no way to enroll in England the injunctive portions of a Scottish judgment. Whyte holds that the argument that equity may enforce foreign non-money judgments is still good, at least in Australia.[12]

These cases do illustrate, at the very least, that the enforcement of a non-money judgment from another place is not a concept which the common law regards as an anathema.

3. Legal doctrines in relation to res judicata and issue estoppel favour the enforcement of non-money judgments

Res judicata, loosely translated, means simply, "a thing judicially decided." The doctrine associated with the term is that, other than on appeal, a person may not bring a matter before the court that has already been the subject of a decision. The term and its maxim appeared in Roman Law[13] and seem to have always been a part of the common law tradition.

There are at least two policy justifications for this prohibition. The first concerns an issue of public policy. It is in the community's general interest to bring some finality to litigation[14], and it is a pillar of the legitimacy of the dispute-resolving function of the court that its judgements and orders should be considered final.

The second justification is one of private justice[15]. The individual should enjoy a right to be protected from harassment from repeated attacks on the same matter in the very public and very expensive forum of court.

The doctrine has been applied procedurally as "estoppel per rem judicatum", or estoppel "on the record". This means that a party will be estopped, or prevented, from raising as an issue a matter that has already been decided upon by a court of competent jurisdiction.

This estoppel may be pleaded in two forms: cause of action estoppel and issue estoppel. Cause of action estoppel prevents a party from relitigating a claim that formed the basis of previous litigation. It often appears where a plaintiff has not obtained judgment in its favour in a previous action, and attempts to re-try the matter in a new forum or with a different spin on the evidence it presented before. In such a situation, the court will strike out the plaintiff's new claims as being res judicata. Such was the case in Ordish v. City of London[16], where the court bristled at the plaintiff's attempt to re-try a matter in an action for damages which had previously been found against him in judicial review proceedings.

Cause of action estoppel is fairly easy to understand and justify, especially if one thinks of its companion from criminal law, the rule against double jeopardy, enshrined in the Charter as the right to not have to stand trial for the same criminal charges more than once.

Issue estoppel is more complicated in practice, if not in theory. A person is estopped

from arguing an issue that has been decided upon in previous litigation. In order for the estoppel to operate, the person claiming the estoppel must show:[17]

1) that the same question has been decided;
2) that the judicial decision which is said to create the estoppel is final;
3) that the parties to the judicial decision or persons claiming through them were the same persons as the parties to the proceedings in which the estoppel is raised or their privies; and
4) that the question at issue was fundamental to the judicial decision arrived at in the earlier proceedings.

An attempt to relitigate an issue is often described as an abuse of process. An application to have a claim struck is often on the basis that the claim is res judicata or an abuse of process, or both.

This rule may operate to prevent either a plaintiff or a defendant from making a claim or defence contrary to a previous judicial decision[18].

The way in which these principles may become relevant is this. A has sued B in Alberta and obtained a permanent injunction restraining B from specified conduct. B moves to Vancouver and A wishes the injunction to continue. A commences a fresh action in Vancouver based on the same facts that were before the court in Alberta. The principles of res judicata and issue estoppel should require that B be estopped from relying on any defence that might have been raised in the Alberta action.

That, at least, is the theory, but concrete examples of its application are difficult to find. Questions of res judicata and issue estoppel arise almost exclusively where a plaintiff, having been unsuccessful in an action brought in territory A attempts to bring substantially the same action in territory B. Principles of res judicata will normally prevent the plaintiff from his attempt to re-litigate the claim.

4. Enforcement schemes currently exist for some kinds of non-money orders

Certain kinds of non-money orders have been expressly made enforceable in provinces by legislation. The clearest example of this is the adoption in many common law provinces of machinery to enforce extra-provincial custody and access orders.[19] Another example is legislation that gives effect to foreign probates.[20]

5. Out-of-province non-money judgments are readily recognized where active enforcement is not required

The difference between recognition and enforcement should be noted. The terms are often interchanged, but, in actuality, a judgment needs to be recognised before it may be enforced. Recognition is the adoption of the foreign decision as res judicata and being as acceptable to the recognising court as if it were a decision of its own. Enforcement is the application of the court's powers to give effect to the decision and may follow recognition, for example, by enforcement proceedings or contempt proceedings. Of course, there are occasions when all a party wants is for the court to recognize the foreign decision as valid, and may only seek to enforce the decision, if at all, in the future. Some decisions, such as declarations of status (marriage, divorce, annulment, adoption, filiation, etc.) may be recognised, but they are not enforceable per se. Also, when a foreign decision is argued to raise an estoppel per rem judicatum, the party claiming the estoppel seeks only the decision's recognition,

not its enforcement.

Foreign orders that require recognition only (as opposed to recognition and enforcement) are routinely given effect. This is particularly true where the order concerns matters of personal status such as divorce.

6. Quebec Law Now Embraces the Enforcement of Non-money Judgments from Outside the Province

Quebec's new Civil Code deals expressly with the recognition and enforcement of foreign decisions.[21] Book 10 of the Civil Code deals with private international law and Title 4, the recognition and enforcement of foreign decisions and jurisdiction of foreign authorities. The core provision states:

Chapter I -- Recognition and Enforcement of Foreign Decisions

3155. A Quebec authority recognizes and, where applicable, declares enforceable any decision rendered outside Quebec except in the following cases:

(1) [the foreign decision was made without jurisdiction -- i.e. where foreign authority did not have jurisdiction according to Chapter II or where Quebec authority would not have jurisdiction according to Title Three];

(2) [the decision is not final or enforceable where the decision was rendered];

(3) the decision was rendered in contravention of the fundamental principles of procedure;

(4) [a dispute between the same parties has been decided or is pending in Quebec]

(5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in public relations

(6) the decision enforces obligations arising from the taxation laws of a foreign country.

This article draws no distinction between judgments for money and other judgments . it refers to "any decision rendered outside Quebec.."

7. The Enforcement of Non-money Judgments are Consistent with Developments in Private International Law

There are two international conventions on jurisdiction and the enforcement of judgments in civil and commercial matters. The first, the Brussels Convention, was designed to provide the framework for the enforcement of judgments between the members of the European Economic Community.[22] The second, the Hague Convention,[23] which was intended to be adopted more widely. The two conventions are quite similar.

The preamble to the Hague Convention recites that the signatory states:

- desiring to establish common provisions on mutual recognition and enforcement of judicial decisions rendered in their respective countries, have resolved to conclude a convention...

The core provision, Article 2, states:

This convention shall apply to all decisions given by the courts of a contracting state, irrespective of the name given by that state to the proceeding which gave rise to the decision or of the name given to the decision itself such as judgment, order or writ of execution. [emphasis added][24]

The generality of this statement is qualified by a list of particular kinds of decisions to which the convention does not apply.[25]

It is also relevant to note that a Canada/France Convention on the enforcement of judgments is currently under negotiation. It is expected that this convention will provide for the enforcement of some non-money judgments.

One should, perhaps, not attach too much weight to these developments. Nonetheless, they do provide evidence that the international community does not regard the enforcement of non-money judgments between states as forbidden territory.

8. Other Federations have Adopted Schemes for the Enforcement of Non-Money Judgments

Other federation have adopted schemes for the enforcement of judgments between their internal units. A fuller description is set out below.

9. Summary

There is a significant number of threads of jurisprudence and legal policy which suggest that a scheme for the interprovincial enforcement of non-money judgments should be developed.

C. The Experience of other Federation

The experience of other Federations whose law derives from the common law may be instructive concerning the form a scheme for the interprovincial enforcement on non-money judgments might take.

1. United States

The US Constitution, Art. IV s. 1 requires States to give full faith and credit to one another's laws, Acts and judicial proceedings.

This has often been used to enforce money judgments in sister States by the familiar

procedure of acting on the judgment as if it were a debt. However, "an action cannot be maintained on a valid foreign judgment ordering that a defendant do or refrain from doing an act other than the payment of money." [26]

"Full faith and credit" appears to work like comity in that it causes the foreign judgment to be taken as evidence of res judicata, and can lead to what we call cause of action estoppel or issue estoppel if the parties attempt to retry the matter. A brief survey of the case law reveals no instance in which Art IV, section 1 has been directly relied on as the basis for the enforcement of a non-money judgment in a state other than that in which it was made.

The Uniform Enforcement of Foreign Judgments Act[27] was implemented in 1948 and amended in 1964. The 1964 revised act has been adopted in 47 states.

Section 1 of the 1964 act sets out the definition of "foreign judgment", which has not changed since 1948:

In this Act "foreign judgment" means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.

Section 2 provides that, upon filing, a foreign judgment will be treated in the same manner as a judgment of a court of the registering state.

The Commissioners' Comments following s. 1 of the 1948 Uniform Act stated:[28]

No distinction is made between judgments and decrees requiring the payment of money, ordering or restraining the doing of acts, or declaring rights or duties of any other character, whether in law or equity, in probate, guardianship, receivership, or any other type of proceedings.

This commentary has been cited in a handful of cases[29] in which the interstate enforcement of non-money judgments was allowed. A superficial examination of the jurisprudence suggests, however, that there is no well-established practice in this regard.[30]

2. Great Britain

While Great Britain is normally thought of as a unitary state, for legal purposes it comprises three distinct law districts: England and Wales, Scotland, and Northern Ireland.

To allow enforcement of judgments across England, Wales, Scotland and Northern Ireland, the UK has long had legislation that permits a person to register a judgment with the court of any of the territorial divisions.[31] Upon enrolling the judgment for debt, damages or costs, the new court then treated the judgment as its own.

This legislation made no provision for non-money orders, and it was found to not apply to

injunctions.[32]

Following the 1968 Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters, Britain revised its whole legislative scheme for dealing with foreign judgments to implement the convention. The Civil Jurisdiction and Judgments Act 1982 also includes new procedures for the registration and enforcement of judgments between juridical entities of the British Isles. Sections 18 and 19, and Schedules 6 and 7 allow for judgments to be enforced in parts of the United Kingdom other than where they were rendered. Schedule 7 specifically deals with the enforcement of UK non-money provisions. Upon registration, a judgment will have the same force and effect as if the judgment were issued by the registering court.[33]

Section 19 requires the recognition of UK judgments, and specifically removes private international law jurisdictional review from preventing recognition.

The Act makes a number of restrictions as to what judgments may be registered. Generally, excluded are:

- orders enforceable under other statutory schemes;[34]
- judgments concerning the legal status or capacity of an individual;[35]
- provisional measures other than orders for the making of interim payments;[36]
- orders which, if enforced, would cause a breach of the law in the registering terrirory.[37]

One commentator applauds the new legislation's attention to non-money judgments, but suggests that section 19 should have excluded review of UK judgments on all grounds, not just jurisdictional. [38] He asserts that public policy, lack of notice and fraud are all common law exceptions to recognition of foreign judgments that are irrelevant to the enforcement regime under Schedule 7.[39] He also notes that not all parts of the Act are worded so they will have retrospective effect on judgments already pronounced at the time of the Act's commencement.[40]

The key provisions of the 1982 Act are annexed to this report.

3. Australia

Australia's Constitution was modelled on that of the US, and as such it includes a "faith and credit" provision. Section 118 of The Commonwealth of Australia Constitution Act[41] reads:

118. Full faith and credit shall be given throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

Section 51 gives the Commonwealth Parliament the power to make laws for the peace, order and good government of the Commonwealth with respect to

(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and

records, and the judicial proceedings of the States.

This power has been exercised in the State and Territorial Laws and Records Recognition Act 1901-1973 (Cth); the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth); and the Service and Execution of Process Act 1992 (Cth).

The State and Territorial Laws and Records Recognition Act instructs all courts to take judicial notice of seals on orders of all other Australian courts[42] and s. 18 reads:

18. All public acts, records and judicial proceedings of any State or Territory, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every

Court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken.

While the State and Territorial Laws and Records Recognition Act was widely regarded as embracing the enforcement of non-money judgments,[43] the Service and Execution of Process Act 1992 (Cth) has put the matter beyond doubt. Part 6 deals with the enforcement of judgments.

105. (1) Upon lodgment of a sealed copy of a judgment, or a fax of such a sealed copy, the prothonotary, registrar or other proper officer of the appropriate court in a State other than the place of rendition must register the judgment in the court.

(2) ... a registered judgment:

(a) has the same force and effect; and

(b) ... may give rise to the same proceedings by way of enforcement; as if the judgment had been given, entered or made by the court in which it is registered.

Section 3, the general definition section for the Act, defines "judgment" at length to include both money judgments and an order under which "a person is required to do or not to do an act or thing (other than the payment of money)". Judgments enforced by the Act also include orders of courts in civil and criminal proceedings and orders made by tribunals.

Section 109 specifically precludes rules of private international law from preventing interstate enforcement:

109. If a judgment is registered in a court of a State under subsection 105 (1), the courts of the State must not, merely because of the operation of a rule of private international law, refuse to permit proceedings by way of enforcement of the judgment to be taken or continued.

The effect of this provision is that a lack of jurisdiction in the court of origin cannot be raised as an objection to enforcement. The scheme seems to contemplate that, Like the UECJA, the defendant must return to the court of origin to raise defences of this kind.[44]

So Australia treats money and non-money judgments alike in its enforcement legislation. A judgment is registered in the new court and treated as if it were an order originally emanating from that court. This solves all the difficulties of having to re-try the case in the new state and removes the need to consider issues of conflicts law and res judicata.

Key provisions of the Australian legislation are annexed to this report.

D. Toward the Development of a Canadian Scheme - Scenarios

In considering the scope and content of a Canadian scheme for the interprovincial enforcement of non-money judgments it may be helpful to bear in mind some examples of circumstances where this scheme might be used.

1. A woman obtains a non-molestation order from a court in Alberta, enjoining her estranged husband from harassing her or from coming within 100 metres of her. Both parties move to Vancouver and the woman is afraid her husband will continue to harass her. What must she do to be protected in B.C.? Must she go to court to have a similar order instated in B.C.? How far can she rely on the Alberta order? If it is resisted, must the court hear the defences her husband raised in the Alberta action?

2. A company in Alberta fears that a former employee may divulge to competitors trade secrets that employee may have learned while working for the company. It goes to the superior Court in Alberta and obtains a permanent qua timet injunction against the former employee. The order enjoins the former employee from divulging any information learned while employed by the company. The former employee moves to Vancouver to work for a competitor. What can be done to prevent the employee from breaching the terms of the Alberta order while in British Columbia? What if the company had obtained an interim injunction only and the claim for a final inunction had not yet been heard?

3. A Saskatchewan court orders the specific performance by A of a contract to convey to B a parcel of land located in Saskatchewan. A moves to Alberta without complying with the order. Should B have any remedy in Alberta? What should it be? What if the order directed the specific performance by A of a contract to sell an oil painting to B and A moved to Alberta taking the oil painting with him? Alternatively, the order might have declared B's ownership of the oil painting and ordered that it be delivered up by A to B.

E. **Questions Concerning the Form and Content of a Canadian Scheme**

1. Is New Legal Machinery Desirable?

This is the threshold question: should a scheme governing the interprovincial enforcement of non-money judgments be developed? The answer it receives may well depend on the kind of order sought to be enforced. A fairly compelling case can be made that an injunction given in family law matters to prevent molestation or harassment should be given effect outside the territory where it was first made. It is unfair and unrealistic to expect an abused spouse to re-litigate entitlement to a protective order on moving to a new province. This is example no. 1 above.

The case is at its weakest in example no. 3 where the order is to convey land. In cases of non-compliance the Saskatchewan court can order that the conveyance be signed by some other person. There is no need to invoke the assistance of the Alberta Court.

Clearly there seems to be the need for legal machinery to enforce at least some kinds of orders. A second question is whether this legal machinery should take the form of uniform legislation? Here the answer seems to be self-evident. It would be a most unhappy development if competing schemes were to arise, each with its own scope and with differing degrees of loyalty to the concept of "full faith and credit." Realistically, it is unlikely that any province or territory will wish to proceed unilaterally to put a scheme in place. Action on this issue will almost certainly involve several provinces proceeding in unison and the possibility of this happening will be greatly enhanced by the existence of uniform legislation.

2. Whose judgments should be enforced?

If a scheme were developed its operation might be confined to Canadian provinces and territories only or it might be opened to embrace truly foreign judgments and orders. The advantage of a Canada-only scheme is that concerns about whether the order sought to be enforced was obtained in conformity with Canadian notions of fairness and due process cease to be of high importance. The narrower scheme lends itself to the adoption of a full faith and credit approach. On the other hand, judgments from outside Canada will now frequently be given effect here so long as only recognition is in issue and there is no need for consequential enforcement measures.

The better view would seem to be that the scheme should be confined to Canadian judgments. It is important that governments, and the public, have confidence in the scheme. If the scheme is so open ended as to embrace judgments which call for novel remedies and which are arrived at through unfamiliar processes, that confidence could be severely shaken. The treatment to be accorded truly foreign judgments, of all kinds, may be best left to a separate project.

A related question is whether an enforcement scheme should be based on reciprocity of the kind embodied in the old Reciprocal Enforcement of Judgments Act and Uniform Reciprocal Enforcement of Maintenance Orders Act. Or should the concept of reciprocity be rejected as was done in UECJA?

3. What kinds of a judgment should be enforced?

What kinds of judgments should be recognized and enforced under the scheme? Should the scheme embrace all non-money judgments?

If the scheme should not embrace all non-money judgments what is the best approach to defining its scope? Should there be a "list" of the types of judgments and orders that are suitable for enforcement under the scheme on the basis that those, and only those, will be enforceable?

A selected list of types of orders that ought to be enforceable under the scheme would probably be limited to those situations where there may be an obvious need to invoke the powers of the court of the enforcing province and where the law currently provides no remedy. Obvious candidates are orders for specific performance, injunctions and orders for the delivery up of specific goods.

Or should a starting point be the proposition that all non-money judgments are enforceable under the scheme, subject to a list of specified exceptions setting out types of orders that are not appropriate for enforcement? This approach, taken in the UECJA and in the U.K. and Australia seems to be most widely accepted and is probably the best suited to Canada.

A list of orders that ought not to be enforceable under the scheme might include orders that are enforceable under existing legislation, such as custody orders and foreign probates.

4. Defences where enforcement is sought

What defences should be available where the enforcement of a judgment is sought under the scheme? Should one adopt a full faith and credit position and permit no defences that call into question the validity of the original judgment. Should the defendant be permitted to assert that the original court lacked jurisdiction to make the order. What if the defendant alleges some other allegedly invalidating cause?

5. Some particular issues

(a) Restraining orders in family law disputes

In most schemes for the enforcement of judgments between territories a precondition to enforcement is some sort of process involving the enrollment or registration of the foreign

judgment with the local court. UECJA is a good example of this. Does this requirement place an unnecessary burden on the person seeking enforcement where the order is one that restrains or limits contact of one spouse with the other (a protection order).

When the police are called on to intervene in a situation of spousal harassment, their response may well turn on whether a valid protection order exists. If the police are satisfied that a protection order exists, they may be prepared to act in marginal situations. If they are forced to rely solely on powers derived from the Criminal Code they may be reluctant to intervene except in cases where the potential for violence or a breach of the peace is beyond doubt. Law enforcement policy in these circumstances may vary a good deal from province to province and even within particular provinces.

Practices may also differ on the question of how the existence of a protection order is to be established in these circumstances. In some cases in may be sufficient for the

threatened spouse to produce what purports to be a copy of the order. In other places its existence may be evidenced in more formal ways. British Columbia has dealt with this question by creating a "central registry of protection orders." This database of orders is accessible to the police on a 24-hour basis to confirm whether the protection order exists, whether it is valid and what conditions it includes.

The extent to which existing practices accommodate out-of-province protection orders is unclear, but it is likely that in most, if not all, cases the police will be reluctant to act solely on an out-of-province protection order.

Even if one concludes that it is desirable to ensure that out-of-province protection orders are recognized by the police, is it possible to deal with this in a uniform fashion? This may be difficult. In British Columbia the obvious answer would be to permit the registration of out-of-province protective orders directly in the central registry as an alternative or supplement to registration in the superior court. Other provinces may require a legislative statement that gives an out-of-province protection order special status.

(b) Should there be a judicial escape hatch?

The decision to grant a non-money judgment, such as an injunction, will frequently entail a large measure of discretion on the part of the judge making the original order. When such an order is sought to be enforced in another province, a judge of the enforcing court might well balk at what he or she sees as an erroneous exercise of discretion - particularly where the sanction for non-compliance might be imprisonment of the defendant. Should there be some residual discretion in the enforcing court to refuse to enforce an out-of-province order it believes was wrongly made.[46]

(c) Should the scheme embrace interim orders?

A condition at common law for the enforcement of a foreign judgment for money was that the judgment had to be final. This requirement of finality continues to be reflected in legislation on the enforcement of foreign of judgments such as UECJA and the English legislation. Should be requirement of finality be retained in a new scheme?

In many instances when an injunction is sought, although the pleadings are drafted to claim a final injunction, the real battle is over whether or not an interim injunction should be granted. When an interim injunction is granted, very often no further steps are taken. Should a scheme recognize this reality and permit the extra-provincial enforcement of interim injunctions?

The same concern applies to the whole range of interlocutory injunctions that might be issued in the course of a proceeding. For example, orders may be given designed to preserve or protect the subject matter of the litigation. The court may issue a Mareva injunction to prevent the defendants disposing of specified assets. Orders such as these would not meet the test of "finality" but is that a sufficient reason to deny their enforcement outside the place where the order was made?

Under the Australian scheme an order is enforceable between states "whether or not the ... order is final."

(d) Orders by Provincial Court Judges

Some orders that are potentially enforceable under the scheme will issue out of Provincial Courts and be made by non-federally appointed judges. The most significant of these will be restraining orders in family law disputes issued under the authority of provincial family law legislation. Are there any problems in bringing these orders within the scheme? In the enforcing province, should they be enforced through the corresponding provincial court or should they be enforced through the superior courts like other out-of-province judgments.

(e) Other kinds of orders

The extended definition of "judgment" in the Australian legislation describes some other kinds of orders brought within the legislation that might also arise in Canada:

"judgment" means:

(d) an order that:

- (i) is made by a tribunal in connection with the performance of an adjudicative function; and
- (ii) is enforceable without an order of a court (whether or not the order made by the tribunal must be registered or filed in a court in order to be enforceable);

6. What form might a Uniform Act take?

Depending on the decisions taken the conceptual content of a new Uniform Act on the Enforcement of Non-Money Judgments might closely parallel that adopted for money judgments. This raises the question whether uniform legislation on the interprovincial enforcement of non-money judgments should be cast as a stand-alone Uniform Act or be picked up in a new and extended UECJA.

A single statute would undoubtedly be more elegant. On the other hand, the provisions relating to the enforcement of non-money judgments may be perceived as more controversial. Some provinces may be quite prepared to adopt UECJA in its current form but might balk at doing so if it carried controversial "baggage."

F. Some Provisional Suggestions and a Draft Act

Many of the issues which arise with respect to non-money judgments also arose and were debated extensively by the ULC in developing the Uniform Enforcement of Canadian Judgments Act. While new legislation must accomodate a number of functional differences between judgments to which UECJA applies and non-money judgments under consideration in this report, there is no reason to believe that the ULC will reverse itself on the major policy decisions underlying UECJA. This would be difficult to defend and could conceivably be regarded as showing a lack of confidence in UECJA itself.

On the assumption that the Conference will wish to adhere to the UECJA model, draft legislation has been prepared which conforms to that model. To help focus discussion, it has been cast as a separate statute although it could be readily consolidated with UECJA. This draft is not intended to foreclose or limit discussion on any of the questions raised above that are not expressly covered in the draft or any other questions that might be raised.

This draft reflects the following assumptions:

- uniform legislation is desirable,
- the enforcement scheme should embrace judgments from Canadian provinces and territories only,
- the scheme should not be based on reciprocity,
- the scheme should adopt as a "default" position that all non-money judgments are enforceable under the scheme, with a list of specified exceptions,
- the list of exceptions should adopt the Australian list as a point of departure,
- the validity of a judgment should not be subject to attack in the enforcing province for lack of jurisdiction in the original court or any other cause, This should be done only in the courts of the place where the judgment was given.
- no "judicial escape hatch" should be provided,
- the scheme should embrace interim orders,
- the scheme should make special provision for orders aimed at curbing domestic violence,

- the scheme should not draw a distinction between judgments of provincial courts and judgments of superior courts,
- the scheme should extend to some decrees made by non-curial bodies.

Footnotes

Footnote: 1 The contribution of Jason Squire, a research assistant with the Law Reform Commission of British Columbia, in the preparation of this Report is gratefully acknowledged.

Eg. Aetna Financial Services Ltd. v. Feigelman, [1985] 1 SCR 2; Morguard Investments v. De Savoy, [1991] 2 WWR 217; Hunt v. T&N plc, [1993] 4 SCR 289.

Footnote: 2 John Swan, in "La 'constitutionalisation' d'un conflit de droit international privé canadien" (1994), 1 Canadian International Lawyer 14, goes as far as to say that Morguard and Hunt show that choice of law rules in interprovincial conflicts within Canada may be replaced by constitutional principles. Perhaps the common law is filling the void in our Constitution left by the lack of a full faith and credit provision?

Footnote: 3 Supra n. 1.

Footnote: 4 See Uniform Law Conference of Canada, 1992 Proceedings at 318. The Uniform Act is also reproduced in Law Reform Commission of British Columbia, Report on the UECJA at 44 (LRC 122,1992). The French language version of the Uniform Act will be found at Uniform Law Conference of Canada, 1991 Proceedings at 431.

Footnote: 5 Supra n. 1 at 237

Footnote: 6 Whyte, "Enforcement of foreign judgments in equity" (1982), 9 Syd LR 630.

Footnote: 7 (1737), 1 Atk. 408; 26 ER 259.

Footnote: 8 Ibid., at 259 (ER).

Footnote: 9 (1834) 8 Bligh NS 301; 2 Cl & F 470; 5 ER 955.

Footnote: 10 Houlditch is only mentioned in terms of the appointment by equity of a receiver for foreign immovable assets (8 Hals. (4th) par. 648). The equitable jurisdiction over enforcement of foreign decrees and orders is not considered.

Footnote: 11 (1888), 58 LJ Ch 5.

Footnote: 12 Supra. note 6,

Footnote: 13 See Spencer Bower and Turner, The Doctrine of Res Judicata (2d ed.), Butterworths (London: 1969) for a more detailed history and analysis of the doctrine.

Footnote: 14 Ibid., para. 10.

Footnote: 15 Ibid., para. 10.

Footnote: 16 (1981) 32 O.R. (2d) 676 (HC).

Footnote: 17 Angle v. M.N.R., [1975] 2 S.C.R. 248 at 254-55.

Footnote: 18 Spencer Bower and Turner, supra n. 13, para. 12.

Footnote: 19 See Uniform Custody Jurisdiction and Enforcement Act; . Family Relations Act, R.S.B.C. 1979, c. 121, part 2.1.

Footnote: 20 While there is no uniform act on this topic, substantial uniformity does exist. See (BC) Probate Recognition Act, R.S.B.C 1979, c. 339 [with origins as S.B.C. 1889, c. 19]; (Alberta) Administration of Estates Act, R.S.A. 1980, c. A-1, s. 30 [S.A. 1969, c. 31]; (New Brunswick) Probate Court Act, S.N.B. 1982, c. P-17.1, s. 73; (Ontario) Estates Act, R.S.O. 1990, c. E.21, s. 52 [S.O. 51 V., c. 9 (1888)]; (Manitoba) Court of Queens Bench Surrogate Practice Act, R.S.M. 1987, c. C290, ss. 48, 50; (PEI) Probate Act, R.S.P.E.I. 1988, c. P-21, ss. 42-45 [S.P.E.I. 1939, c. 41, s. 56]; (Newfoundland) Judicature Act, R.S.N. 1990, c. J-4 [S.N. 1986, c. 42]; (Saskatchewan) Surrogate Court Act, R.S.S. 1979, c. S-66, ss. 78-80 [1930, c. 51, s. 76]; (Nova Scotia) Probate Act, R.S.N.S. 1989, c. 359, s. 34 [1889, c. 12]. The statutes vary a bit in scope from province to province. All provinces except for Newfoundland name the United Kingdom in the legislation as a terrirory whose probates granted by a court of competent jurisdiction will be recognised. All provinces except for BC, PEI, Newfoundland and Nova Scotia mention the other Canadian provinces; presumably PEI would include other provinces as "any part of the British Commonwealth". BC and Newfoundland provide that territories whose probates will be recognised be designated by regulation. Nova Scotia will recognize the probates of any British province, territory or possession. New Brunswick, Manitoba and Saskatchewan also recognize the probate orders of all the United States. Many of the common law provinces' resealing provisions define "probate" to include letters of verification from Quebec.

Footnote: 21. Civil Code of Quebec, S.Q. 1991, c. 64.

Footnote: 22 1968.

Footnote: 23 1971.

Footnote: 24 The corresponding provision of the Brussels Convention, Art. 25, is framed in similar terms.

Footnote: 25. These include certain family law matters, succession matters and bankruptcy.

Footnote: 26 Corp. Jur. Sec, "Judgments" par. 868 (a)

Footnote: 27 13 Uniform Laws Annotated 149 (West Pub. Co.)

Footnote: 28 At 13 Uniform Laws Annotated 183-84 (West Pub. Co.)

Footnote: 29 La Verne v. Jackson (1967), 84 Ill App 2d 445; 228 NE 2d 249, Schroeder v. Homestead Corp. (1956), 163 Neb 43; 77 NW 2d 618, Marie Callender Pie Shops, Inc. v. Bumbleberry Enterprises, Inc. (1979), 39 Or App 487; 592 P2d 1050.

Footnote: 30 The fact that "full faith and credit" does not seem to have provided a vehicle for the enforcement of non-money judgments may reflect other constitutional forces at work. The enforcement of an out-of-state judgment will be overlaid by a requirement that "due process" has been observed and the court in the state where enforcement is sought can inquire into whether the original court properly took jurisdiction.

Footnote: 31 Including Judgment Extension Act 1868 and Inferior Courts Judgment Extension Act 1868.

Footnote: 32 Re Dundee and Suburban Railway Co. (1888), 58 LJ Ch. 5.

Footnote: 33 Civil Jurisdiction and Judgments Act 1982, Sched. 7, par. 6; R Black, "Enforcement of Scottish decrees outside Scotland and of non-Scottish decrees within Scotland." (1987) 32 JLS Scotland 10.

Footnote: 34 Ss. 18(3), (5).

Footnote: 35 S. 18(5)(d). This appears to reflect similar provisions in the Brussels Convention.

Footnote: 36 S. 18(5)(d). This probably corresponds to the common law requirement for finality. The provision likely excludes the enforcement of Mareva injunctions.

Footnote: 37 Schedule 7, par. 5(5). This seems aimed at creating a "public policy" exception.

Footnote: 38 Stone, "The Civil jurisdiction and Judgments Act 1982: Some comments." (1983) 32 International and Comparative Law Quarterly 477 at 487-88.

Footnote: 39 Ibid., 488.

Footnote: 40 Ibid., 488.

Footnote: 41 63 & 64 Vict. c. 12

Footnote: 42 S. 5.

Footnote: 43 See Law Reform Commission (Australia), Report on Service and Execution of Process at 228 (Report No. 40, 1987)

Footnote: 44 See Law Reform Commission (Australia), ibid at 234.

Footnote: 45 Assuming it has adopted the Uniform Court Orders Compliance Act. See s. 5(2)(e).

Footnote: 46 An example of a judicial escape hatch is found in section 50(7) of the Uniform Arbitration Act which permits a court to refuse to enforce arbitral award:
50. (7) If the award gives a remedy that the court does not have jurisdiction to grant or would not grant in a proceeding based on similar circumstances, the court may,
(a) grant a different remedy requested by the applicant; or
(b) in the case of an award made in (enacting jurisdiction), remit it to the arbitral tribunal with the court's opinion, in which case the arbitral tribunal may award a different remedy.

March 1997