# Interprovincial Enforcement of Non-money Judgments 1997

## The Interprovincial Enforcement of Non-Money Judgments

Report of the
British Columbia
Commissioners

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### A. Deliberations at the 1996 Meeting

This matter came before the Civil Law Section at its 1996 meeting. Discussion was based on a report prepared by the British Columbia Commissioners which set out a number of threshold questions and included preliminary draft legislation. The following decisions and discussion emerged from the Section's deliberations

#### 1. The Need for Uniform Legislation

There was virtual unanimity that uniform legislation in this area was desirable and that its development should proceed.

#### 2. The Scheme Should be Confined to Canadian Judgments

An enforcement scheme should be confined to judgments originating in Canadian provinces and territories. It should not embrace judgments from outside Canada. **See footnote 1**

#### 3. Full Faith and Credit

Rather than requiring reciprocity between the jurisdiction of origin and the enforcing jurisdiction, a new uniform act should operate on a full faith and credit basis similar to that embodied in UECJA. This includes the policy in UECJA of not permitting the defendant to resist enforcement on the basis that the original court lacked jurisdiction. As with money judgments, the defendant must seek relief in the original jurisdiction.

### 4. Judgments of Courts Only to be Enforced

The scheme should provide only for the enforcement of orders made by courts (including provincial courts as well as superior courts). It should not permit the enforcement of orders of non-curial bodies, whether or not they are enforceable as judgments in the place where they are made.

### 5. The Kinds of Orders that Should be Enforceable

There was general agreement that the approach of a uniform act should be to create a default position under which all non-money judgments were enforceable with exceptions

to the default position created where there was good reason for doing so. The only good reason identified for doing so was where particular kinds of judgments from within Canada are enforceable under specialized legislation. Particular kinds of judgments identified for exclusion on this basis were:

judgments for money **See footnote 2**
judgments in relation to rights of custody of or access to a minor **See footnote 3**
judgments relating to probate and letters of administration. **See footnote 4**

### 6. Interim Orders

A new uniform act should permit the enforcement of interim orders. **See footnote 5**

### 7. Power of the Court to Modify or Limit Enforcement

In UECJA the court of the enforcing province has only limited powers to restrict the enforceability of an out-of province judgment. The focus of these powers is the circumstance where steps have been, or are being, taken to appeal, set aside or modify the judgment in the place where it was made. Here the enforcing court may entertain an application for a stay of enforcement of the judgment

A consideration of these powers in the context of non-money judgments opened the door on a wide-ranging argument concerning the need for additional machinery in a new uniform act that is not necessary with respect to money judgments. The reality is that

money judgments are a relatively fungible commodity and are enforced similarly in most jurisdictions. Non-money judgments can be extremely local in character and might give rise to a variety of enforcement problems when they migrate across provincial boundaries.

One possible problem is where, for perhaps highly technical reasons, the form of the judgment does not conform to local usage and will require fine-tuning to a lesser or greater extent to give it effect in the enforcing province. Other technical questions concerned the circumstances (if any) in which the defendant should receive some kind of notice of the registration of a non-money judgment. How should the Act handle orders (such as certain "no-contact" orders) which require some sort of notification to the defendant before they come operative?

A different issue arises where the jurisdiction of the original court is founded on or provides relief of a kind that has no counterpart in the jurisdiction where enforcement is sought. An example given is an order made in one province which bans secondary picketing, migrating to a province where secondary picketing is permitted and then the plaintiff seeks to have the order forbid secondary picketing there. There seemed to be a general consensus that the court in the enforcing jurisdiction should not be required to give effect to that order. Discussion ensued on how this should be done and a number of suggestions were put forward. **See footnote 6** No final conclusions were reached although the mood of the Section was clear that this issue should be expressly addressed in a new uniform act.

The Section also discussed the need for a more general judicial escape hatch. It was suggested that there might be areas where it might make sense to allow the court to refuse enforcement. An example is where the plaintiff has done something to disentitle himself or herself to seek enforcement. Delay is an obvious instance but there may be others such as a lack of clean hands and the like. The concern is that this should not provide an opportunity for the defendant to force a relitigation of the basic issues so if something like a lack of the plaintiff's clean hands might have been raised initially it is consistent with the scheme that it should not be permissible to raise it at the enforcement stage. There might also be circumstances where the enforcing court finds the result itself somehow offensive to its processes.

No detailed conclusions were reached on any of these issues.

**8. Protection Orders**

The 1996 Report raised the question whether special treatment or status should be accorded orders that restrain or limit contact of one spouse with the other (protection orders). The Report pointed out:

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 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.

The general approach taken in the draft legislation that accompanied the 1996 Report was to insulate law enforcement authorities from liability arising on their reliance on what purported to be a valid out-of-province protection order. **See footnote 7**

Deliberations on the status of protection orders was inconclusive. There was general sympathy with the aims of the Report and the draft legislation but no real conclusions emerged. It was hoped that further consultation might identify an appropriate course of action.

### 9. One Uniform Act or Two?

Debate ensued on whether legislation in relation to non-money judgments should be blended with UECJA to form a single uniform act. There seemed to be general agreement that this would be the most elegant ultimate solution. There were, however, advantages to maintaining non-money judgments in a separate statute for the time being. If consultation is to take place, circulating a "blended" statute would invite commentators to revisit decisions taken with respect to money judgments which we do not wish to open as part of this process. Distributing a separate Act for consultation purposes will avoid that.

Concern was also raised whether a blended Act would be less saleable since it carried the "baggage" of non-money judgments. There seems to be a general willingness of provinces

to proceed to enact UECJA but if those who have not yet done so in a couple of years are presented with a new Uniform Act that embraces both kinds of judgments and gives the appearance of "take it all or take none" they might decide to take none. Further discussion on this question was deferred to 1997.

### 10. Conclusion

At the close of deliberations the British Columbia Commissioners were requested to craft a revised version of the draft legislation that takes into account the discussions that took place and consult with Conference Executive on the consultation that should take place before the 1997 meeting.

## B. Consultation

### 1. The Consultation Paper

In September 1996 work commenced on the production of a revised version of the draft legislation. The aim was to incorporate firm decisions taken by the Section with respect to the act and to adopt reasoned positions with respect to those issues that the Section wished to see addressed but on which it provided no explicit guidance. An extensive commentary was also prepared for the draft act. The revised draft act is annexed and forms part of this Report.

At the same time, a further document was prepared that briefly described the background and approach of the draft act. Taken together the two documents constituted a Consultation Paper meant to elicit feedback and response on the project.

The consultation paper was then forwarded to the ULC central office for further distribution. From there, copies were sent to each of the Jurisdictional Representatives in the provinces and territories to seek comments through those channels. Copies were also sent to the Canadian Bar Association with a request that it be distributed to the appropriate sections for comment and review. Copies were also distributed at the Annual Workshop on Commercial and Consumer Law held in Toronto in October 1996.

### 2. Response to the Consultation Paper

Response to the Consultation Paper was extremely disappointing. Only one response was received. This response pointed out in a new context **See footnote 8** the problems that could flow from allowing an injunction that reflects a public policy choice embodied in the statutes of the province of origin to be enforced in a second jurisdiction that has not adopted that choice. The respondent offered one suggestion (discussed below) concerning the draft act.

## C. Section 6 of the Draft Act - Powers of the Court

Section 6 of the draft act is a response to the concerns and issues described above under the heading "Power of the Court to Modify or Limit Enforcement." It differs from its counterpart in UECJA in two ways. First, the UECJA provision simply provides for an application to the court of the province where enforcement is sought for a stay of enforcement, and sets out the circumstances in which such a stay might be appropriate.

Section 6 creates a slightly different framework. It is characterized as permitting an "application for directions" with a stay of enforcement as only one of the orders that might be made on such an application. The grounds on which a stay is appropriate are greatly enlarged. The operation of section 6 is described in the commentary to the act.

The one comment received suggested an additional power in the court that might be exercised on an application for directions. Consider this example.

Certain conduct constitutes a tort at common law (public nuisance was the example given by the commentator) in both province **A** and province **B**. Province **B** alters its law so that particular circumstances that would otherwise provide a complete defence to an action can no longer be raised. The law of province **A** is not changed. **P** brings an action against **D** in province **B** and succeeds in obtaining an injunction. P seeks to enforce the injunction in province **A**.

If **D** seeks a stay of enforcement how is the court in province **A** to deal with it where there has been no finding of fact in province **B** respecting the existence or non-existence of the

circumstances that might constitute a defence? The suggestion made by the commentator is that on an application for directions, the court should be able to order the trial of an issue. Whether or not a stay of enforcement would be granted would depend on its outcome.

## D. Issues for Decision

The section must take decisions on the following issues to settle the contents of a new uniform act providing for the enforcement of non-money judgments between Canadian provinces and territories.

### 1. Protection Orders

Do we wish to continue to single out protection orders for special treatment? If so, is the approach taken in section 3(2) of the draft acceptable? Should the provision be designated as optional and [square bracketed].

**2. Powers of the Court - Section 6**

Is section 6 an appropriate response to the concerns raised by the Section at the 1996 meeting? In particular:

* Should the court be given additional powers that might be exercised on an application for directions (such as the ability to order the trial of an issue)?

* Is paragraph (1)(c)(iv) too limiting in restricting the court to a consideration of the enforcing party's conduct that occurs only after the decree is made? Should "conduct" be the focus of the provision?

* Are there better ways of framing the "extended public policy" exclusions set out in paragraphs (1)(c) (v) and (vi).

* Subsection (3) sets out two circumstances in which an application for directions is compulsory. Are there any other circumstances that should be added to the list?

**3. Orders in relation to Probate and Administration**

Is the section content to leave this exclusion from the uniform act as optional with paragraph (f) in the definition of "Canadian decree" square bracketed?

**4. Other Provisions**

Is the Section satisfied that the other provisions of the draft act adequately reflect and carry out the provisional decisions taken at the 1996 meeting? Does the section adhere to those decisions?

**5. The Commentary**

The commentary that forms part of the draft legislation was intended to provide a point of departure for the commentary to the final version of the uniform act. Is the Section content with the general thrust of the commentary? What improvements might be made?

**6. Legislative Distribution**

Should the uniform legislation for the interprovincial enforcement of non-money judgments be cast as a stand-alone statute or be blended with the *Uniform Enforcement of Canadian Judgments Act*, with which it has many features in common? As indicated above,

this question was discussed at the 1996 meeting and a decision deferred to 1997.

A preliminary question may be whether it is necessary to make such a choice. Would it be possible to end up with three distinct uniform acts - one for each of money and non-money judgments and a blended act for those jurisdictions that want it? Is there any precedent in the work of the ULC for such an approach?

If there is a separate uniform act for non-money judgments what should its title be? The title provisionally adopted is the "*Uniform Enforcement of Canadian Decrees Act*." Is there a better title?

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***Footnote: 1*** *1. There was some discussion about the potential interface between a new uniform act and possible uniform legislation on the enforcement of foreign judgments. There was general agreement that any discussion of this would be premature but the possibility was raised that a Uniform Foreign Judgments Act might act as a filter for judgments from outside Canada. Once there had been some determination, in some fashion, that a foreign judgment met whatever criteria were involved and was suitable for enforcement within Canada, it might then be deemed to be a Canadian judgment for the purposes of this legislation so as to link into the enforcement machinery.*

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*Footnote: 2 2. It was agreed that, so long as non-money judgments are dealt with in a separate Act, it was appropriate to exclude money-judgments from the definition of decree.*

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*Footnote: 3 3. Existing uniform legislation deals with this topic. Considerable debate was also focussed on guardianship orders both as to person and to property. It was the view of the Conference that it was not appropriate to exclude either of these two types of orders from the list.*

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*Footnote: 4 4. The 1996 Report pointed out that 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 territory 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. At the 1996 meeting questions were raised about excluding probate and administration orders. The approach adopted in this Report is to leave them on the list of exclusions but square bracketed with a note indicating that each jurisdiction might wish to examine the efficacy of its own local legislation respecting foreign probates and determine which Act (or both perhaps) they wish to govern.*

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*Footnote: 5 5. As the 1996 Report pointed out, 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 UECJA. 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. 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 that does not seem to be a sufficient reason to deny their enforcement outside the place where the order was made.*

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*Footnote: 6 6. One suggestion was that the concept of a local public policy could be invoked by the judge in that case although others expressed concern about widening the ambit of public policy in this kind of context. Another suggestion was made that the enforcing court might refuse to give effect to the order where it is satisfied that the court in the original jurisdiction did not intend the order to have effect outside of that jurisdiction.*

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*Footnote: 7 7. A "B.C. alternative" would have linked the enforceability into registration with the protection order registry.*

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*Footnote: 8 8. The particular concern related to judgments made in reliance on statutes that alter the burden of proof or eliminate defences in public nuisance actions.*