

UNIFORM LAW CONFERENCE OF CANADA

CIVIL SECTION

**POTENTIAL AMENDMENTS *TO THE UNIFORM ENFORCEMENT OF
CANADIAN JUDGMENTS AND DECREES ACT* – FOREIGN CIVIL
PROTECTION ORDERS**

**REPORT OF THE JOINT
ULCC/CCSO WORKINGGROUP**

Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have not been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the Conference and its Delegates. Please consult the Resolutions on this topic as adopted by the Conference at the Annual meeting.

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August 22 - 26, 2010

Joint ULCC/CCSO Working Group Report on Foreign Protection Orders

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[1] In 2002, the ULCC adopted the civil protection order amendments to *The Uniform Enforcement of Canadian Judgments Act* as recommended by a joint ULCC/CCSO working group. The provinces of Manitoba, Nova Scotia and Saskatchewan have enacted these amendments with the province of British Columbia indicating that it is giving active consideration implementing these amendments. Newfoundland and Labrador has implemented the Act but not the amendments thus far.

[2] The amendment provided for special rules for the enforcement of Canadian civil protection orders. A Canadian civil protection order was defined to mean orders made in any other Canadian jurisdiction that prohibit a broad range of activities, from communication to actual contact, that can be used by one individual to intimidate, threaten, coerce or otherwise harass another individual.

[3] Under the Bill, the order is deemed to be an order of the local superior court that is fully enforceable in the same manner as an order of that court. As such it can be enforced by law enforcement agencies in the same manner as a local court order whether or not the order has been registered in that jurisdiction in the regular manner.

[4] The amendments also provided for good faith liability protection for law enforcement agencies that take steps to enforce an order. The amendments apply to all Canadian civil protection orders that are already in effect when the Act comes into force in addition to any future Canadian civil protection orders.

[5] In 2003, the ULCC adopted *The Uniform Enforcement Foreign Judgments Act* which provides for the recognition and enforcement of eligible foreign judgments through a registration process with the local superior court.

[6] The ULCC project advisory committee recommended that the ULCC initiate a project for the ULC to give consideration to a further amendment to *The Uniform Enforcement of Canadian Judgments Act* to extend the application of the Canadian civil protection orders to similar foreign judgments (foreign civil protection orders). It has been suggested that the same policy considerations that form the basis for the 2002 amendments are applicable to foreign protection orders, particularly those from the United States. Accordingly, with the assistance of CCSO family, a joint ULCC/CCSO working group was reconstituted to consider this issue and make recommendations to the annual ULCC meeting in Nova Scotia in August of 2010.

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[7] The ULCC members of the joint Working Group are:

Russell Getz, British Columbia
Lynn Romeo, Manitoba,
James Gregg, Nova Scotia
Darcy McGovern, Saskatchewan.

[8] The CCSO members of the joint Working Group are:

Betty Ann Pottruff, Saskatchewan
Kim Newsham, Saskatchewan
Colette Chelak, Manitoba
Michelle Kinney, British Columbia.

[9] The ULCC project advisory committee had asked that an initial report of this working group be made at the annual meeting in Nova Scotia in August of 2010. This report is intended to reflect the discussions and any initial conclusions of the Working Group.

[10] The working group started with the basic question of “How are the existing provisions working in the jurisdictions that have the amendment?”

[11] Saskatchewan, Manitoba and Nova Scotia are the jurisdictions that have proceeded with the Canadian civil protection order provisions with British Columbia having indicated that it may soon follow. Inquiries in these jurisdictions regarding the operation of the existing provisions reflect that no system is in place to track such enforcement efforts. Anecdotally, it is not apparent that even one such order has yet been enforced in these jurisdictions.

[12] Accordingly it must be acknowledged that there is no empirical argument to be made for such an amendment. It must also be acknowledged that there is an ongoing reluctance in some jurisdictions to legislatively endorse full faith and credit in the recognition and enforcement of judgments within Canada. The argument for such an amendment is therefore substantive as a matter of policy rather than a response to a demonstrable demand.

[13] The policy argument for this approach may be summarized as follows.

[14] Civil Protection Orders have become increasingly common in family law and domestic violence legislation in Canada. These orders are based on the recognition of the need to provide a tool for enforcement agencies to separate at risk individuals from potentially violent partners or family members. The gross disparity between the impact of taking cautious preventive action when weighed against the impact of the extreme risk of violence for failing to act has led to the widespread use of these measures in the Civil law. They are not criminal sanctions and they may readily be challenged by the parties in

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the courts if subsequently viewed as inappropriate or inaccurate by either party. The balance of interests between providing immediate safety for an individual against the simple requirement of not contacting that individual for a certain amount of time has correctly been settled in favour of the person at risk for several years in Canada.

[15] The purpose of the changes that were previously made to *The Uniform Enforcement of Canadian Judgments Act* was to promote the similar immediate protection of victims of violence that have crossed provincial or territorial boundaries. By removing the requirement of registration for recognition and enforcement of these orders and legislatively insulating enforcing police agencies from liability for good faith actions taken in compliance with such an order, the major impediments to cross-border enforcement could be addressed. The Act does not apply to Criminal Code orders such as a peace bond. The Act will be practically restricted to the enforcement of personal non-contact or proximity orders given that exclusive possession orders or orders relating to a specific address (i.e.- stay away from a particular school) will have no application for inter-jurisdictional enforcement.

[16] With these first principles in mind, we are now asked to consider concomitant changes to the enforcement of foreign protection orders. The ease of international cross-border travel combined with the severe risk to an individual who cannot obtain immediate recognition and enforcement of a foreign protection order by policing agencies makes consideration of this approach a priority. Again, the balance of interests between the temporary separation of an individual at risk from another individual and the possibility of violence arising from a failure to Act for formalistic reasons strongly tilts towards an honest exploration of the options available to recognize foreign protection orders.

[17] The ULCC has previously concluded that where a Canadian court has determined that an individual needs protection it should as much as possible receive immediate recognition and enforcement on its face. Rather than presuming the Court may have got it wrong or acted inappropriately, the ULCC concluded that the presumptive approach will be to respect the order until it is effectively challenged rather than challenging the order until it is formally duplicated in our own particular province. Where a foreign state court has made a similar protection order, there should be strong reasons as to why to challenge that order on its face by requiring local registration or local duplication rather than simply honouring it on its face in order to separate the parties. There are no final financial or property ownership consequences that stem from such enforcement; the order may be challenged substantively the next day. But in an emergent circumstance with an individual at risk, the choice of recognizing at least those orders from those foreign states that are most acceptable to a given jurisdiction seems consistent with a principled approach to this issue.

[18] Having summarized the policy argument, it remains of course, a decision of the plenary of the ULCC as to whether to proceed with a draft Uniform Amending Act or a model amending Act on this topic. As requested, the working group undertook the following analysis of alternatives for such an amending Act for consideration.

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[19] The working group engaged the starting premise that, as with the Canadian judgment enforcement provisions in the Act, recognition and enforcement of foreign protection orders should not hinge on reciprocity. The reciprocity model is viewed as ineffective and outdated given its reliance on formal agreements with foreign jurisdictions rather than a focus on the policy grounds upon which a foreign order should be recognized.

[20] With this foundation in mind, the drafting of such a provision was given some initial consideration by members of the Working Group.

Draft Amendments

The Saskatchewan versions of the relevant provisions of *The Enforcement of Foreign Judgments Act* and *The Enforcement of Canadian Judgments Act, 2002* are used for purposes of illustration. The proposed draft amendments are highlighted:

The Enforcement of Foreign Judgments Act.

Short title

1 This Act may be cited as The Enforcement of Foreign Judgments Act.

Interpretation

2 In this Act:

“**civil proceeding**” means a proceeding to determine a dispute between two or more persons, one or more of whom may be a government body, the object of which is a judgment, order, decree or similar instrument that:

(a) in the case of a violation of a right, requires a party to comply with a duty or pay damages; or

(b) in any other case, determines the personal status or capacity of one or more of the parties; (« instance civile »)

“**foreign judgment**” means a final decision made in a civil proceeding by a court of a foreign state, rendered by means of a judgment, order, decree or similar instrument in accordance with the laws of that state, and includes a final decision made by an adjudicative body other than a court if the enforcing court is satisfied that the adjudicative body is the body that determines disputes of the kind in question in that state; (« jugement étranger »)

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“**Canadian civil protection order**” means a Canadian judgment, or a portion of a Canadian judgment, that prohibits a person from:

(a) being in physical proximity to a specified person or following a specified person from place to place;

(b) contacting or communicating with, either directly or indirectly, a specified person;

(c) attending at or within a certain distance of a specified place or location; or

(d) engaging in molesting, annoying, harassing or threatening conduct directed at a specified person; (« ordonnance civile de protection au Canada »);

“**Canadian judgment**” means a judgment, decree or order made in a civil

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proceeding by a court of a province or territory of Canada other than Saskatchewan:

(a) that requires a person to pay money, including:

(i) an order for the payment of money where the order is made in the exercise of a judicial function by a tribunal of a province or territory of Canada other than Saskatchewan and is enforceable as a judgment of the superior court of unlimited trial jurisdiction in that province or territory; and

(ii) an order made and entered pursuant to section 725 of the Criminal Code in a court of a province or territory of Canada other than Saskatchewan;

(b) pursuant to which a person is required to do or not do an act or thing; or

(c) that declares rights, obligations or status in relation to a person or thing; but does not include a judgment, decree or order that:

(d) is for maintenance or support, including an order enforceable pursuant to The Family Maintenance Act, 1997;

(e) is for the payment of money as a penalty or fine for committing an offence;

(f) relates to the care, control or welfare of a minor, other than a Canadian civil protection order;

(g) is made by a tribunal of a province or territory of Canada other than Saskatchewan whether or not it is enforceable as an order of the superior court of unlimited trial jurisdiction of the province or territory where the order was made, to the extent that it provides for relief other than the payment of money; or

(h) relates to the granting of probate or letters of administration or the administration of the estate of a deceased person; (« jugement canadien »)

“foreign judgment” means a foreign judgment as defined in *The Enforcement of Foreign Judgments Act* by a court of a prescribed foreign state.”

“Foreign civil protection order” means a foreign judgment, or a portion of a foreign judgment, that prohibits a person from:

(a) being in physical proximity to a specified person or following a specified person from place to place;

(b) contacting or communicating with, either directly or indirectly, a specified person;

(c) attending at or within a certain distance of a specified place or location; or

(d) engaging in molesting, annoying, harassing or threatening conduct directed at a specified person;

PART III

Canadian Civil Protection Orders

Deeming of order

10.1 A Canadian civil protection order is deemed to be an order of the Court of Queen’s Bench and may be enforced in the same manner as an order of that court for all purposes.

Enforcement by law enforcement authorities

10.2 A Canadian civil protection order is enforceable by a law enforcement authority in the same manner as an order of the Court of Queen’s Bench, whether or not the order is a registered Canadian judgment.

Registration permitted

10.3 A Canadian civil protection order may be registered and enforced pursuant to Part II.

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Immunity

10.4 No action or proceeding lies or shall be commenced against a law enforcement authority, including an employee or agent of a law enforcement authority, for anything in good faith done, caused or permitted or authorized to be done, attempted to be done or omitted to be done by that person or by any of those persons pursuant to or in the enforcement or supposed enforcement of a Canadian civil protection order or purported Canadian civil protection order pursuant to this Part or the regulations made pursuant to this Act.

Application of Part

10.5 This Part applies to a Canadian civil protection order:

- (a) that is in force at the time this Part comes into force; or
- (b) that is issued after this Part comes into force.

10.6 Effective this date this section comes into force, a foreign civil protection order is deemed to be a Canadian civil protection order for the purposes of this Part.”

The proposed definition of “foreign judgment” outlined above squarely engages the question of whether the Act should only be extended to protection orders from the United States? Stated more broadly, the Working Group debated:

What foreign judgments should be recognized and how should that occur in the Act?

The working group identified three basic options for this amendment:

1. Recognize all foreign protection orders.

Unlike with money judgments or other civil judgment enforcement, it can be argued that a protection order is less susceptible to invalidation on the grounds set out in the Act as a whole. Issues of bias and fraud have less relevance in this context where the fundamental aspect of enforcement is simply keeping two individuals apart. The central policy issue for enforcement of such issues remains the decision to give primacy to the need to provide immediate protection for any individual that a court has deemed fit to provide with this special legal protection. As with Canadian domestic violence legislation, the operational premise is that the immediate risk to the individual in the middle of the night should be addressed in preference to any challenges to the validity of that order which can subsequently be made in the light of day with less immediate risk to the subject of the order.

If this is the first principle for this amendment, it begs the question of why any foreign judgment would be excluded? The vast majority of orders that are sought to be enforced will be from familiar jurisdictions. In any event, the individual seeking to enforce the order will always bear the responsibility of seeking to ensure that the law enforcement agency in question is able to recognize the order as a foreign judgment that should be enforced. Those law enforcement officers are in turn

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protected from liability for enforcement steps that are taken in good faith in reliance on such an order. An inappropriate order can be challenged the next day. But in the middle of the night, at the time of immediate risk, is it not preferable and consistent with current policy to enforce the protection order on its face regardless of origin rather than concluding that nothing can be done and departing?

The argument against this approach is easily stated. Full faith and credit for protection orders is not yet established between Canadian provinces and territories; it is unrealistic to expect law makers to embrace full faith and credit for such orders on a global basis.

2. Restrict extension of the Act to the United States only.

Restricting the application of the proposed amendment to the United States is both an empirical recognition of proximity and, therefore, demand as well as an incremental first step for an extraordinary process. Issues of language as well as concerns as to validity of the judgment and the process that led to that judgment are minimized with this approach. There is considerable confidence that the purpose, intent and process for such protection orders are sufficiently familiar to readily warrant enforcement. Full faith and credit for such orders is already slow to be established between states and between Canadian provinces and territories; it may simply be unrealistic to cast a net beyond the United States until at least that process has proven effective.

Conversely, the argument can certainly be made that there are several other jurisdictions that share at least equal confidence and legal familiarity as orders stemming from the United States. If this is a valid policy choice with respect to the United States, the proposed amendment should be able to accommodate additional foreign states at the discretion of the implementing jurisdiction.

3 Allow addition of foreign states for enforcement through the regulations.

The proposed definition for foreign judgment as set out above would permit a prescribed list of states to be listed by regulation for recognition and enforcement of protection orders stemming from that state. This approach would allow for local discretion as to what foreign states should be listed for these purposes based on local patterns of interaction and potential demand. British Columbia may have vastly different immigration and industry patterns than, for example, Saskatchewan or Nova Scotia. It would also permit additions and removals to the list to be made reflect changing realities. It would also be easier for enforcement agencies to manage when presented with such orders. This option was viewed by the Working Group to be the most flexible and therefore the most palatable from an implementation perspective.

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The argument against this option is, substantively, why should immediate protection to any presumptively vulnerable person be denied given that an inappropriate order can be readily challenged in a subsequent process that does not bear such risk? Procedurally, this approach carries much of the disadvantages of the old reciprocal enforcement of judgments approach of requiring ongoing amendments to local regulations to be made to reflect local conditions. In addition, this approach makes a lack of uniformity for enforcement of foreign protection judgments inevitable from province to province to territory.

Further Instructions

With this brief summary of the debate engaged by the Working Group in mind, the Working Group would like to ask the plenary conference of The Uniform Law Conference of Canada its views on these fundamental questions before proceeding further with any drafting of a proposed Uniform Bill:

Should the Act be amended to address foreign protection orders?

If so, what foreign protection orders should be recognized for enforcement and how should that occur in the Act?

The Working Group would seek further instruction on these issues and, of course, invite identification and discussion of any alternatives that have not yet been identified for consideration. The next steps of the Working Group regarding this proposed amendment will, of course, be dictated by the direction of the Conference as a whole. We look forward to the discussion and debate at the plenary session and remain willing to proceed as directed in this regard.