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A. Introduction

Judgments[1] that emanate from other Canadian provinces and territories are not consistently recognized and enforced,[2] despite the federal nature of our county and the homogeneity of its legal system. As a result, a party who has obtained a judgment in one province may find that it is not enforceable elsewhere in Canada and may, depending on a variety of factors, be required to bring a wholly new action in the province where enforcement is sought. This can result in great inconvenience and cost.

There are several variables that determine the ease with which, and whether, a Canadian judgment will be enforced extraprovincially. These include whether enforcement is necessary for the order to take effect, whether enforcement of the judgment is facilitated or guaranteed by a statutory scheme, whether enforcement machinery exists at common law (this usually turns on whether or not the judgment awards money), and whether the court that issued the judgment was the proper forum for the trial.

Money judgments have historically been recognized and enforced at common law. The basis for this in legal theory is that an award of a judgment for the payment of money is characterized as creating a new obligation; an obligation which may be the basis of an action in a second court as if it were created consensually.[3] Defences that were, or might have been raised in the first action cannot be raised in the second. Thus at common law foreign money judgments were recognized and enforced by sovereign nations because they were regarded simply as another species of debt.

More recently, provinces have enacted legislation to facilitate the enforcement of money judgments across provincial borders. The older type of scheme is based on the Uniform *Reciprocal Enforcement of Judgments Act*[4] which provides for registration of money judgments from reciprocating provinces. Once registered, the judgment is as enforceable as an

1. A note on words: in this Report we use "Judgment" to refer generally to both judgments for the payment of money and judgments awarding relief other than the payment of money. The term "decree" is used as an alternative to refer to non-money judgments specifically. Money judgments are simply referred to as "money judgments." This Report is concerned with the enforcement of "decrees."

2. *See e.g. Bonczuk* v. *Bourassa*, (1986) 30 D.L.R. (4th) 146 (H.C.). In this case, a Québec court awarded custody of a child to the father. The order was held to be not enforceable in Ontario and custody was awarded to the mother. Legislative developments have changed the state of family law, but cases such as this are indicative of the common law approach to enforcement of extraprovincial decrees.

3. The elements of recognition and enforcement are treated by J.G. Castel in *Canadian Conflict of Laws* (4th. ed., 1997) at chapters 14-15. Essentially, recognition means that the judgment is accepted in the new forum as a conclusive resolution of the case, while enforcement entails a further procedure to give effect to the order. Recognition is a necessary precondition for enforcement. At common law, the plaintiff was required to relitigate in the new forum, but this has been altered through the adoption of reciprocal enforcement agreements between provinces.

4. This uniform act was developed by the Uniform Law Conference of Canada (ULCC). All provinces except for Québec have implemented reciprocity schemes aimed at simplifying the enforcement of extraprovincial money judgments. In British Columbia this is found in Part 2 of the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78.

order made by a local court. A weakness in this legislation is that it embodies a group of jurisdictional rules that fails to reflect the changes wrought by recent court decisions.[5]

A more modern approach is found in legislation based on the ULCC's Uniform *Enforcement of Canadian Judgments Act*, now adopted in three provinces.[6] It supersedes the reciprocal enforcement legislation.

While money judgments are generally enforceable across provincial borders, the enforcement of non-money judgments is more problematic. Such judgments are not accommodated by the common law[7] and generally, except in the most acute situations,[8] are ignored by statute. It is this deficiency that is addressed in this report.

B. Some Implications of the Current Law

The implications of the current legal position are most clearly illustrated by examining some scenarios that might arise:

> **Scenario 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.? How far, if at all, can she rely on the Alberta order? Must she go to court to obtain a similar order in B.C.? If it is resisted, must the court hear the defences her husband raised in the Alberta action?
>
> **Scenario 2.** A company in Alberta fears that a former employee may divulge to competitors trade secrets that the employee learned while working for the company. It goes to the superior court in Alberta and obtains a permanent restraining order 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 injunction had not yet been heard?
>
> **Scenario 3.** A Saskatchewan court orders **A** to convey to **B** a parcel of land located in Saskatchewan (this is called an order of "specific performance"). **A** moves to

5. Principally *Morguard Investments Ltd.* v. *de Savoye*, [1990] 3 S.C.R. 1077 and the decisions that apply it. *See* Law Reform Commission of British Columbia, *Interim Report on Enforcing Judgments from outside the Province* (LRC 117, 1991).

6. Prince Edward Island, Saskatchewan and British Columbia. *See Enforcement of Canadian Judgments Act* (Supplement) R.S.B.C. 1996, c. 115. Not yet in force.

7. The common law position is not wholly beyond doubt. *See* text at notes 10 to 16.

8. *See* text and notes 23 and 24.

> British Columbia without complying with the order. Should **B** have any remedy in British Columbia? 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 British Columbia taking the oil painting? Alternatively, the order might have declared **B**'s ownership of the oil painting and ordered that **A** deliver it to **B**.

In all of these cases it would be necessary to commence a wholly new proceeding in a British Columbia court relying on the same facts on which the original judgment was based. The only assistance the current law might give to the enforcing party is to limit the range of defences that might be raised in the second action. The waste that is involved in bringing a second proceeding is obvious. Moreover, it causes delay that could result in serious loss or damage to the person having the benefit of the order.

These consequences raise squarely the need for a legislative scheme of some kind that would permit judgments such as these to be enforced directly in other provinces and territories in a fashion similar to money judgments.

C. The Case for Reform

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 such as the *Uniform Enforcement of Canadian Judgments Act* was not, therefore, a new and radical measure. Rather, it 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.

Legal machinery that would permit 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, be regarded as unacceptable for that reason. In making the case for reform, a first step is to demonstrate that machinery for the interprovincial enforcement of non-money judgments has doctrinal roots of its own and is consistent with other contemporary legal developments. 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:[9]

> 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

9. N. 5 at 237

> 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

There may be equitable jurisdiction to enforce foreign non-money orders,[10] though it does not appear to have been exercised since the implementation of the *Judicature Acts*. In *Morgan's Case*[11] 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...."[12]

In *Houlditch* v. *Marquis of Donegal*,[13] 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.[14] The equitable principle they supposedly stand for was overlooked by the Lord Chancellor in *Re Dundee and Suburban Ry. Co.*[15] where the court said there was no way to enroll in England the injunctive portions of a Scottish judgment. One commentator holds that the argument that equity may enforce foreign non-money judgments is still good, at least in Australia.[16]

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.

10. Whyte, "Enforcement of Foreign Judgments in Equity" (1982) 9 Syd LR 630.
11. (1737) 1 Atk. 408; 26 ER 259.
12. At 259 (ER).
13. (1834) 8 Bligh NS 301; 2 Cl & F 470; 5 ER 955.
14. *Houlditch* is only mentioned in terms of the appointment by equity of a receiver for foreign immovable assets (8 Hals. (4th) para. 648). The equitable jurisdiction over enforcement of foreign decrees and orders is not considered.
15. (1888) 58 L.J. Ch. 5.
16. Whyte, n. 9.

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[17] 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,[18] and it is a pillar of the legitimacy of the dispute-resolving function of the court that its judgments and orders should be considered final. The second justification is one of private justice.[19] 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. The doctrine extends to issues that might have been, but were not, raised in the earlier proceeding.

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*,[20] where the court rejected 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 (or might have been raised but was not) in previous litigation. In order for the estoppel to operate, the person claiming the estoppel must show:[21]

- that the same question has been decided;

17. *See* Spencer Bower and Handley, *The Doctrine of Res Judicata* (3rd ed., 1996) for a more detailed history and analysis of the doctrine.

18. Para. 10.

19. Para. 10.

20. (1981) 32 O.R. (2d) 676 (HC).

21. *Angle* v. *M.N.R.*, [1975] 2 S.C.R. 248 at 254-55.

- that the judicial decision which is said to create the estoppel is final;
- 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; and
- 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.[22]

The way in which these principles are relevant is this. **A** sues **B** in Alberta and obtains 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 was, or 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 one territory attempts to bring substantially the same action in another territory. Principles of *res judicata* will normally prevent the plaintiff from attempting 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 enactment in many common law provinces of machinery to enforce extra-provincial custody and access orders.[23] Another example is legislation that gives effect to foreign probates.[24]

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 the reality is that a judgment needs to be recognised before it may be enforced. Recognition is the adoption of the foreign decision as being *res judicata* and 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 execution proceedings or contempt proceedings.

22. Spencer Bower and Handley, n. 16 .

23. *See Uniform Custody Jurisdiction and Enforcement Act*. In B.C., this has been enacted as Part 3 of the *Family Relations Act*, R.S.B.C. 1996, c. 128.

24. While there is no uniform act on this topic, substantial uniformity does exist. *See* (BC) *Probate Recognition Act*, R.S.B.C 1996, c. 376 [with origins as S.B.C. 1889, c. 19]. (Other provinces have substantially similar legislation.)

There are, however, occasions when all a party wants is for the court to recognize the foreign decision as valid, and may seek to enforce the decision, if at all, only in the future. Some decisions, such as declarations of status (marriage, divorce, annulment, adoption, paternity, etc.) may be recognised, but they do not require actual enforcement. 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 Embraces the Enforcement of Non-money Judgments from Outside the Province

Quebec's *Civil Code* deals expressly with the recognition and enforcement of foreign decisions.[25] 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."

25. Civil Code of Quebec, S.Q. 1991, c. 64.

7. Interprovincial Enforcement through Penal Sanctions

A provision of the *Criminal Code* of Canada makes it an offence to disobey a court order, without reference to jurisdictional limits.[26] This provision has seldom been invoked[27] and it is unclear how it would apply to extraprovincial non-money judgments. It does provide some indication that interprovincial respect and enforcement of such orders is consistent with the public policy of Canada.

8. The Enforcement of Non-money Judgments is Consistent with Developments in Private International Law

There are three international conventions on jurisdiction and the enforcement of judgments in civil and commercial matters. The Brussels Convention and the Lugano Convention, were designed to provide the framework for the enforcement of judgments between certain European states.[28] The second, the Hague Convention[29] was intended to be adopted more widely. All the 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:[30]

> 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]

The generality of this statement is qualified by a list of particular kinds of decisions to which the convention does not apply.[31]

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26. *Criminal Code*, R.S.C. 1985, c. C-46:

> 127(1) Everyone who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

27. In the case of *R.* v. *Clement*, [1981] 2 S.C.R. 468, 472, it was invoked, and Estey J. observed that "[t]he legislative competence of the Parliament of Canada in criminal law under s. 91(27) of the *British North America Act* may in some circumstances extend to the attachment of criminal consequences to breaches of conduct proscribed in provincial legislation..."

28. *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*. Signed on 27 September 1968 (Brussels Convention). *Lugano EEC-EFTA Judgments Convention*. Signed 16 September 1988.

29. *Convention on Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Hague Convention, 1971).

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

31. These include certain family law matters, succession matters and bankruptcy.

As Canada is not a party to these conventions, one should, perhaps, not attach too much weight to them. Nonetheless, they do provide evidence that the international community does not regard the enforcement of non-money judgments between states as an inappropriate part of a judgment enforcement scheme.

There are also two international developments that are more directly relevant to Canada. First, the recently concluded Canada/France Convention on the enforcement of judgments provides for the enforcement of some non-money judgments.[32] Second, currently under development at the Hague is a multilateral convention on the enforcement of judgments that will embrace both money and non-money judgments.[33] Canada is an active participant in this process.

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

Other federations permit the enforcement of non-money judgments between their internal units. Comprehensive schemes are in place in Great Britain and Australia.[34] The experience of the United States is less helpful.[35]

10. 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 is appropriate for adoption in British Columbia.

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32. The *Canada/France Convention*, an enforcement treaty between its eponymous signatories, has provisions to accommodate enforcement of decrees. If ratified by the federal governments of both countries, it will create a mutual judicial area between the contracting parties. In fact, it will create a system whereby a decision rendered in Marseilles is more readily enforced in British Columbia than one made in Manitoba. The Convention can be accessed at http://www.law.ualberta.ca/alri/ulc/97pro/ecfcon.htm.

33. The *Hague Conference on Private International Law*. The member states of this conference include Canada, Japan, the United States, and a number of other countries. Pursuant to these negotiations, the Special Commission on international jurisdiction and the effects of foreign judgments in civil and commercial matters (10-20 November 1998) drafted rules on the various issues (*see* Work. Doc. No. 144 E). British Columbia Law Institute Chair Gregory K. Steele is a member of the Canadian delegation to the Hague in relation to this convention.

34. Descriptions of these schemes may be found in the 1996 Proceedings of the ULCC at pp. 253-257, 269-275.

35. 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" - Corp. Jur. Sec, "Judgments" par. 868 (a). "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.

D. Uniform Legislation on Enforcement

In 1997 the Uniform Law Conference of Canada (ULCC)[36] promulgated two uniform acts designed to fill the gap in Canadian law with respect to interprovincial enforcement of non-money judgments. They were designed to provide a rational and comprehensive scheme that would bring the law into harmony with the common law principle of *res judicata* and the principles of comity as enunciated in *Morguard*.

The first Act, the *Uniform Enforcement of Canadian Decrees Act* (*UECDA*)[37] focuses solely on non-money judgments and was intended for enactment as a complement to the *Uniform Enforcement of Canadian Judgments Act* which it follows structurally and conceptually. The ULCC had in mind that it might be adopted by those jurisdictions which had already enacted the uniform legislation concerning money judgments.

The second Act is the *Uniform Enforcement of Canadian Judgments and Decrees Act (UECJDA)*. It addresses both money judgments and non-money judgments and was intended to assist those provinces that wished to proceed with respect to both kinds of judgments in a single Act.[38]

So far as these two uniform acts address non-money judgments, their drafting is virtually identical. The principal features of the legislation are described below. For convenient reference, we refer to the two uniform acts collectively as *UECDA/UECJDA*.

1. Scope

As its title suggests, *UECDA* applies to "decrees," a term that embraces all non-money judgments, subject to certain express exceptions. A list of these exceptions appears in section 1. They include (i) orders made by quasi-judicial tribunals and (ii) decrees relating to certain matters covered by other statutory schemes.[39] This list of specified exceptions avoids the potential difficulty in delineating every instance in which the Act is applicable. Comparable legislation in the U.K. and Australia has also adopted this approach.

36. The Uniform Law Conference of Canada (ULCC) is an organization that was established in 1918 to develop and promote uniformity of legislation throughout Canada. Its stated mandate is "to facilitate and promote the harmonization of laws throughout Canada by developing, at the request of the constituent jurisdictions, Uniform Acts, Model Acts, Statements of Legal Principles and other documents deemed appropriate to meet the demands that are presented to it by the constituent jurisdictions from time to time."

37. For the full text and comments refer to Appendix A. The act is also available for downloading or viewing at the ULCC website. The address is: http://www.law.ualberta.ca/alri/ulc/acts/edecrees.htm.

38. The full text and commentary is set out as Appendix B. The Act is also accessible at the ULCC website: http://www.law.ualberta.ca/alri/ulc/acts/euecjda.htm.

39. *See* Appendix A, s. 1(c-f). For greater certainty money judgments are also expressly excluded.

In *UECJDA* non-money judgments are part of the definition of "Canadian judgment," but the same list of exclusions apply.[40]

2. Reciprocity

UECDA/UECJDA do not require reciprocity.[41] A reciprocity rule would involve a regime where the domestic court will enforce judgments of a second state only if the second state will enforce the judgments of the first state on a similar basis. This concept was used extensively in earlier statutes[42] but was not carried forward in *UECDA/UECJDA*. By avoiding reciprocity, the Acts more fully embrace the idea of "full faith and credit"[43] and more accurately reflect the spirit of Canadian federalism. This approach is also strongly supported by the Supreme Court in *Morguard*,[44] and as such is in harmony with the current common law. One commentator observed that "...[one thing is] indisputable about the judgment in *Morguard* ... the appropriateness of 'reciprocity' as a permissable basis for enforcement is explicitly rejected."[45]

3. Full Faith and Credit

UECDA/UECJDA also reject the notion of a supervisory role for the enforcing court.[46] To avoid a preoccupation with determining if the court of origin had proper jurisdiction, the Act only allows minor alterations to the extra provincial decree.[47] In the context of the *Uniform Enforcement of Canadian Judgments Act* this position has been criticized as being unfairly prejudicial to the defendant, because the plaintiff could potentially secure a judgment in a forum

40. *See* Appendix B, s. 1, "Definition of Canadian Judgment" (d) to (h).

41. *See* Appendix A and B, s. 4. This section describes the effects of registration and allows for enforcement of extraprovincial decrees with no mention of reciprocity.

42. Such as the *Reciprocal Enforcement of Judgments Act*, enacted under various names in most of the provinces.

43. This constitutional principle was mentioned in *Amopharm Inc.* v. *Harris Computer Corp.*, (1992) 93 D.L.R. (4th) 524, 526. Brooke J.A. states that "[t]he courts in one province should give 'full faith and credit' to the judgments of courts of the other provinces or territories so long as these courts have properly or appropriately exercised jurisdiction."

44. *Morguard*, n. 5.

45. John Swan, "The Enforcement of Canadian Judgments Act," (1993) 22 Can. Bus. Law J. 87 at 98.

46. Appendices A and B, s. 6(3).

47. Appendices A and B, s. 6. *UECDA/UECJDA* permit a stay of enforcement where a challenge to the decree is in process or pending in the place where it was made. They also permit an application to court for directions respecting the enforcement of the decree which allows the court to "fine tune" the decree by modifying it in any way to make it enforceable in conformity with local practice.

that has no real connection to the case.[48] However, by giving "full faith and credit" to judgments of other provinces, without an inquiry into the propriety of the jurisdiction of the court of origin or the merits of the decision, the Act defers to the consistent quality of justice among the provinces.

The *Morguard* decision has done much to rationalize the jurisdictional rules and introduce a degree of uniformity that was previously lacking by adopting the "real and substantial connection" test as determinant of a court's right to hear a case.[49] Moreover, courts use various discretionary techniques to control where proceedings are brought, including the doctrine of *forum non conveniens* and other measures to prevent inconvenience.[50]

4. Application

The application of *UECDA/UECJDA* is selectively retrospective.[51] They apply to decrees issued before the legislation is in force only in situations where the defendant took part in the proceedings. The Acts do not apply to orders, from proceedings that commenced before enactment, that were given in default, because the absent parties may have been acting reasonably on legal advice that the law at the time made it safe to ignore distant litigation.[52]

5. Interim Orders

UECDA/UECJDA accommodate interim orders in relation to non-money judgments, as well as final orders.[53] This approach is a departure from the traditional conflict of law rules. In

48. *See* Vaughan Black, "Uniform Enforcement of Canadian Judgments Act: Uniform Law Conference of Canada (1991); Enforcement of Canadian Judgments Act, S.B.C. 1992, c. 37," (1992) 71 Can. Bar Rev. 721 at 725. Black discusses s. 6(2) of the *Enforcement of Canadian Judgments Act*, S.B.C. 1992, c. 37, which is similar to *UECDA* s. 6(3), [see Appendix A] and concludes that "...residents of provinces which enact the *UECDA/UECJDA* who have the misfortune to be served with the process of another province which lacks substantial contacts with them or with the cause of action will have but one place to raise that objection: the province whose assertion of jurisdiction is, by definition, unfair."

49. *Morguard*, n. 5 at 1104. This measure of the nexus between subject matter and forum originated from the House of Lords decision *Indyka* v. *Indyka,* [1969] 1 A.C. 33. Further clarity could be achieved through the enactment of the *Uniform Court Jurisdiction and Proceeding Transfer Act*.

50. See, e.g. *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board),* [1993] 1 S.C.R. 897, [1993] 3 W.W.R. 447, 77 B.C.L.R. (2d) 62; *472900 B.C. Ltd.* v. *Thrifty Canada* (18 December 1998), Vancouver Registry, CA02319 (B.C.C.A.); *Westec Aerospace Inc.* v. *Raytheon Aircraft Co.* (19 April 1999), Vancouver Registry, CA025410 (B.C.C.A.).

51. Appendices A and B, s. 11(b).

52. The Law Society of Upper Canada, for example, under its insurance scheme, does not compensate clients for damages arising from advice that was given on laws that change to the client's detriment.

53. *See* Appendices A and B, s. 2(1).

Gauthier v. *Routh*,[54] and many subsequent cases,[55] Canadian courts have insisted that foreign orders must be final to be enforced. The test of finality generally entails that the judgment, at the time it is made, is not provisional, defeasible, interlocutory or liable to variation, abrogation, recall or modification by the issuing court.

The approach of embracing interim orders was adopted in *UECDA/UECJDA* due to the unique considerations surrounding non-money judgments. For example, in the course of proceedings, a court may issue a *Mareva* injunction[56] to prevent the untimely sale or relocation of assets by the defendant. Under the common law rule, this type of interim order does not qualify as "final" but it would be unreasonable to exclude it from the ambit of the Act. Often, too, the unstated purpose of modern litigation is simply to secure an interim injunction. Once such an order has been granted, no further action is taken. This reality is reflected in *UECDA/UECJDA*.

6. Protection Orders

Protection orders have been given unique recognition in *UECDA/UECJDA*.[57] The registration procedure required for protection orders, while the same as that required for other types of orders, provides an additional feature: police are insulated from civil liability that could arise from reliance on an unregistered order. Orders that deal with spousal harassment were singled out by the drafters of *UECDA/UECJDA* as deserving special treatment because of the perceived need, in some circumstances, for an expedited confirmation process. Delay, in establishing the existence or validity of such an order, can have serious consequences in situations of family violence. To mitigate these consequences, the disincentive to police officers to act on an unconfirmed order (the risk of being held liable for the enforcement of an unregistered or invalid order) is removed.

E. Adopting Uniform Legislation on the Enforcement of Canadian Decrees

The Law Institute of British Columbia has concluded that one of the two uniform acts providing for the enforcement of Canadian decrees should be adopted in this province. It might be argued that if we are the first province to adopt such legislation, a degree of uniformity in this area of the law may in fact decrease, and defendants here will be placed at a relative disadvantage to

54. *Gauthier* v. *Routh*, (1843), 6 O.S. 602 at 607 (U.C.C.A.). This case involved a decree to save harmless, made prospectively, whereby the defendant was held liable to pay the plaintiff the sum for which the plaintiff might have to pay to a third party.

55. This requirement of finality is also embraced by the *Enforcement of Canadian Judgments Act* (Supplement) R.S.B.C. 1996, c. 115, s. 2(1)(a).

56. *E.g.* in *Aetna Financial Services Ltd.* v. *Fiegleman et al.*, (1985) 15 D.L.R. (4th) 161, the Supreme Court of Canada considered whether to allow an *ex parte* injunction restraining the appellant from removing assets from Manitoba pending the action.

57. *See* Appendix A s. 7; Appendix B s. 3(2).

defendants in other provinces.[58] This concern, while valid, represents only a temporary situation that will diminish as successive provinces adopt this legislation. When enough provinces have adopted *UECDA/UECJDA*, the transitional asymmetries will no longer exist.

The reality is that some province must be the first to enact the new legislation. Since *UECDA/UECJDA* has its origins in work carried out in this province and our representatives were heavily involved in its development, it is entirely appropriate that British Columbia should assume a leadership role in adopting the act to encourage acceptance and ratification throughout Canada.

F. Special Issues

Some special issues surrounding the adoption of such legislation require further exploration. These include the possibility of a judicial escape hatch, possible defences including that of public policy, the section concerning protection orders, and the question of whether one act, or a blended act, is preferable.

1. One Act or Two?

British Columbia has the option of enacting either *UECDA* or *UECJDA*. Since the province has already enacted the *Uniform Enforcement of Canadian Judgments Act*,[59] its operation would be nicely complemented by the enactment of *UECDA*. On the other hand, the *Uniform Enforcement of Canadian Judgments Act* is not yet in force so it would be a relatively simple matter to repeal that statute and enact *UECJDA* which embraces both money and non-money judgments.

It is our conclusion that the second of these two options provides the best solution. We believe that, in principle, it is undesirable to have two separate statutes that address what is substantially the same subject matter. Moreover, dealing with them in a single statute ensures that future amendments must necessarily address both kinds of judgment and that the courts interpreting the legislation will adopt principles that are consistent for the enforcement of both money judgments and decrees.

2. Judicial Escape Hatch

An important consideration is the extent to which the enforcing court should be permitted to limit enforcement or somehow modify or revisit the original judgment. *UECJDA* permits a stay of enforcement to be ordered where proceedings have been taken or are pending in the original

58. Black, n. 48 at 726 observes that "...since it is likely that some but not all the common law provinces will enact *UECDA*, or at least unlikely that all provinces will do so soon, the more probable effect of that uniform Act will be to *decrease* uniformity."

59. *Sub nom. Enforcement of Canadian Judgments Act*, R.S.B.C. 1996 (Supp) c. 115. Not yet in force.

jurisdiction to appeal or have the judgment set aside.[60] Also, as noted above, *UECJDA* permits a degree of "fine tuning" in relation to the judgment.[61] The question is whether it is appropriate, in this context to confer on the enforcing court a broader discretionary power to deny enforcement - a kind of "judicial escape hatch."

The argument in favour of a judicial escape hatch lie in the fact that large numbers of non-money judgments will award what are called "equitable remedies"[62] such as injunctions and orders for specific performance. Equitable remedies have always been discretionary in the sense that the courts are permitted to deny relief even where the plaintiff has demonstrated a *prima facie* entitlement to it.[63] A wide discretion to refuse enforcement of an extra provincial decree could simply be regarded as carrying forward this policy.

A judicial escape hatch of this kind, however, would mark a significant retreat from the principle of full faith and credit that is central to the Act. Allowing the enforcing court to second-guess the decision of the original court undermines the efficacy of the Act, and ignores the very principles on which it is founded; namely, that of confidence in, and respect for, judgments emanating from other provinces within the Canadian federation. The discretion to deny a litigant an equitable remedy has always been exercised by Canadian courts on a principled basis and the application of these principles is not qualitatively different from the application of settled rules of law. Again, referring the defendent back to the courts where the decree was given seems the most appropriate approach. *UECJDA* adopts this position and we agree.

3. Defence of Public Policy

A well recognized ground for refusing to enforce a foreign judgment is that it somehow violates the "public policy" of the province. Both *UECDA* and *UECJDA* recognize the defence of public policy.[64] Normally the courts will give effect to a public policy defence only in the most egregious circumstances, *i.e.* where the original judgment is contrary to universally accepted principles of justice or morality. This defence has been invoked under other enforcement statutes, usually when enforcement of the judgment would hinder compliance with another local

60. Appendix B, s. 6(2)(c)(ii).

61. *Ibid.*

62. Such remedies include specific performance, injunction and, since 1858, with the passage of the *Chancery Amendment Act 1858*, 21&22 Vict., c. 27 (commonly known as *Lord Cairns' Act*), damages in lieu of or in addition to an equitable remedy. This act is in force in B.C. through the operation of section 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

63. When a common law right has been infringed, the plaintiff is automatically granted a common law remedy, but in equity, the aggrieved must not only show that a right has been infringed, but also that the situation merits the applicability of an equitable remedy. Certain conditions generally serve to bar the application of equitable relief; for example, inequitable conduct on the part of the applicant (the doctrine of clean hands). For a further discussion on discretionary remedies, *see* G.W. Keeton and L.A. Sheridan, *Equity* (3rd ed., 1987) 19 or Hanbury and Martin, *Modern Equity* 15th ed., 1997.

64. *See* Appendix A, s. 6(2)(c)(iv).

law.[65] The exact nature of the term 'public policy' is left undefined in the Act, but conflict of laws literature and case law has generally confined the public policy defence to:[66]

> restraint of trade, champerty, interference with criminal prosecutions, fraud, collusion and divorce, certain protections of diplomats and the like. The doctrine of public policy is invoked only where the foreign law offends a principle of morality or justice which commands almost universal recognition.

On its face, therefore, the public policy defence recognized in *UECDA* is limited to the relatively narrow criteria found in the case law and arguably such a defense will seldom succeed.

A question that confronted the Uniform Law Conference of Canada when it developed *UECDA/UECJDA* was whether the notion of public policy should be reinforced by some specific guidelines as to the requirements of public policy in particular situations. It gave the following example of circumstances in which more specific guidance would be helpful:

> [A]n order might be made in province "X", under the authority of a statute regulating the marketing of produce, that a named individual is enjoined from growing or trafficking in turnips. It would be inappropriate to allow this order to be enforced in provinces where the turnip industry is unregulated.

One solution considered by the ULCC was a provision framed in the following terms.

> (c) [The court may] make an order staying or limiting the enforcement ... if
> ....
> (iv) in the opinion of the court, the conduct of the enforcing party between the time the decree was made and the time enforcement is sought disentitles that party to seek enforcement,
> (v) in the opinion of the court, the decree was not intended by the court that made it to take effect outside the province or territory where it was made,
> (vi) in the opinion of the court, the decree was based on a law that advances a policy that is purely a matter of local concern in the province or territory where it was made,
> (vii) the decree was made under the authority of an enactment of the province or territory where it was made which, in the opinion of the court, is inconsistent with the policy of the law of [the enacting province or territory], or
> (viii) the decree is otherwise contrary to public policy in [the enacting province or territory].

65. *See*, for example, *Canadian Imperial Bank of Commerce* v. *Oliphant and Oliphant*, (1983) 30 Sask. R. 8 (Q.B.), where McIntyre, J. barred the registration of an order nisi under the *Reciprocal Enforcement of Judgments Act*, R.S.S. 1978, c. R-3 s. 4(f) because such registration would be contrary to the *Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16, s. 16.

66. *First Pacific Credit Union* v. *Sawatzky*, (1985) 47 Sask. R. 92, 99-100. *See also Boardwalk Regency Corp.* v. *Maalouf*, (1992) 88 D.L.R. (4th) 612, 622 (Ont. C.A.) where the defence of public policy is denied. Carthy J.A., in attempting to explain the defence of public policy, states that "[t]he common ground for all expressed reasons for imposing the doctrine of public policy is essential morality. This must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred."

In the "turnip example" any of clauses (v) to (vii) might have been invoked by the court as a basis for refusing to give effect to the extra-provincial decree.[67]

In the result, however, the ULCC was concerned that a provision along the lines set out above would not address all the public policy issues likely to arise. It concluded that the preferable course was to leave the public policy exception stated in general terms and hope that the courts would apply it sensitively in cases that raise issues of this kind.

While we share the concern of the ULCC that a simple reference to "public policy" as a basis for refusing enforcement may be insufficient, we do not believe that, at this stage at least, it justifies a departure from their conclusions. It would always be possible in the future to develop a more sophisticated public policy defence that would operate in this context and it is preferable that such work be a response to problems that have arisen in practice rather than be based on speculation of what those problems might be.

4. Protection Orders

As noted previously, orders that limit or restrain contact of one spouse with the other were singled out for special treatment by the drafters of *UECJDA* This exception was included in response to a perceived need for quick response in situations of family violence. For instance, a woman to whom a protection order has been granted may move to another province and be followed by her estranged partner. If the estranged spouse breaches the conditions of the order and the woman contacts the police, the police will often wish to confirm the validity of the order.

Where a protection order originates in British Columbia, its details will normally be available 24 hours a day to the police through a special registry maintained by the province. But this registry contains no particulars of protection orders from out-of-province and the only way to get such an order into the system would be to take it to the Supreme Court, register it under the *UECJDA* scheme and then take steps to have it recorded in the registry of protection orders. However, when violence is imminent the person protected by the order simply has no time to take these steps. Something more is needed.

The strategy of *UECJDA* is to focus on the issue of civil liability of police officers who act in reliance on what is, on its face, a valid out-of-province protection order. It provides in section 3(2):

> (2) Law enforcement authorities acting in good faith may, without liability, rely on and enforce a purported Canadian judgment that
>
> (a) was made in a proceeding between spouses or domestic partners having a similar relationship, and
>
> (b) enjoins, restrains, or limits the contact one party may have with the other for the purpose of preventing harassment or domestic violence
>
> whether or not the judgment has been registered in the [superior court of unlimited trial jurisdiction in the enacting province or territory] under subsection (1).

67. Clause (iv) was designed as a partial answer to the argument in favour of a judicial escape hatch.

We endorse this approach but also urge that Provincial authorities explore the possibility of allowing out-of-province orders to be brought directly into the existing provincial registry without the need for registration in the Supreme Court.

G. Summary

The need for legal reform in this area is pressing. La Forest, J., in *Morguard Investments Ltd.* v. *de Savoye*, summarizes several of the most acute deficiencies in current private interprovincial law as follows:[68]

> It seems anarchic 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?

The adoption of *UECJDA* would strengthen the legal and political character of the Canadian federation by ensuring mutual respect for non-money judgments, by facilitating personal mobility and by harmonizing an area of the law currently in disarray.

H. Recommendations

The Institute Recommends that:

1. The *Enforcement of Canadian Judgments Act* be repealed and replaced by a statute similar to the *Uniform Enforcement of Canadian Judgments and Decrees Act*.

2. British Columbia justice officials explore ways of making the Central Registry of Protection Orders more receptive to extraprovincial orders.

68. N. 5 at 1102-1103.

Appendix A

Uniform Enforcement of Canadian Decrees Act

Introductory Comment: Apart from legislation that addresses particular types of orders, there is no statutory scheme or common law principle which permits the enforcement in one province of a non-money judgment made in a different province. This is in sharp contrast to the situation that prevails with respect to money judgments which have a long history of enforceability between provinces and states both under statute and at common law. With the increasing mobility of the population and the emergence of policies favouring the free flow of goods and services throughout Canada, this gap in the law has become highly inconvenient. The purpose of this Uniform Act is to provide a rational statutory basis for the enforcement of non-money judgments between the Canadian provinces and territories.

The Uniform Enforcement of Canadian Decrees Act (UECDA) embodies the notion of "full faith and credit" in the enforcement of judgments between the provinces and territories of Canada. There are two aspects to this. First, it rejects the concept of reciprocity. Where the UECDA has been adopted in a province, a litigant who has obtained an order in a second province may enforce it in the first province whether or not the UECDA has been adopted in the province where the order was made.
Second, the Act rejects a supervisory role for the courts of a province or territory where the enforcement of an out-of-province order is sought. In enforcing money judgments, the law has been preoccupied with the question of whether the court which gave the judgment had the jurisdiction to do so. If a Canadian decree is flawed, because of some defect in the jurisdiction or process of the body which gave it, the approach of the UECDA is to regard correction of the flaw as a matter to be dealt with in the place where it was made.

The UECDA embodies policies similar to those found in the *Uniform Enforcement of Canadian Judgments Act* (UECJA) which provides machinery for the interprovincial enforcement of money judgments. A conscious effort has been made to make the approach and drafting of this Act parallel that of UECJA so far as the significant differences between money judgments and non-money judgments permit this to be done.

Definitions

1 In this Act:

"Canadian decree" means a judgment, decree or order made in a civil proceeding by a court of a province or territory of Canada other than [enacting province or territory]

(a) under which a person is required to do or not do an act or thing, or

(b) that declares rights, obligations or status in relation to a person or thing

but does not include a judgment, decree or order that

(c) requires a person to pay money,

(d) relates to the care, control or welfare of a minor,

(e) is made by a tribunal of a province or territory of Canada other than [enacting province or territory], 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, or

[(f) relates to the granting of probate or letters of administration or the administration of the estate of a deceased person;]

Comment: A central concept of UECDA is the "Canadian decree." The term first receives an expansive definition in paragraphs (a) and (b) which is then narrowed by the exclusions that follow. The first limb of the inclusive definition embraces orders like injunctions and those for specific performance. The second limb brings in orders that create certain rights or relationships. These might include things like adult guardianship orders. It will also include orders which are purely declaratory. Some kinds of declarations are recognized under current law, but that recognition may be subject to a jurisdictional challenge. Bringing them within the definition ensures that the full faith and credit principle applies to them

Excluded from the definition are types of orders that are the subject of existing machinery for interprovincial enforcement. The exclusion of probate orders is optional and enacting jurisdictions may wish to examine their local legislation respecting the recognition of foreign probates and decide whether they wish to rely on that or on UECDA.

The exclusion of orders of tribunals ensures that the scheme is confined to true court orders. Non-money orders made by tribunals are often intensely local in the policies they advance and unsuitable for interprovincial enforcement.

"enforcement" includes requiring that a Canadian decree be recognized by any person or authority whether or not further relief is sought;
"enforcing party" means a person entitled to enforce a Canadian decree in the province or territory where the decree was made;
"registered Canadian decree" means a Canadian decree that is registered under this Act.

Right to register decree

2 (1) A Canadian decree may be registered under this Act for the purpose of enforcement, whether or not the decree is final.

Comment: This act embraces interim orders as well as final 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 the UECJA. In the context of non-money judgments, other considerations arise.

There is a 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 or maintain the *status quo*. 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 seems an insufficient reason to deny their enforcement outside the place where the order was made.

Moreover, 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 legislation recognizes this reality.

(5) A Canadian decree that also contains provisions for relief that may not be enforced under this Act may be registered under this Act except in respect of those provisions.

Comment: This ensures that a decree that provides for other relief is enforceable as to the provisions that are within this Act. For example an order made in a matrimonial proceeding may provide for the payment of money, custody of children of the marriage, and limit the contact one spouse may have with the other. The last

of those provisions would be enforceable under this Act. The other provisions would be enforced under other schemes.

Procedure for registering decree

3 A Canadian decree is registered under this Act by paying the fee prescribed by regulation and by filing in the registry of the [superior court of unlimited trial jurisdiction in the enacting province or territory]

(a) a copy of the decree, certified as true by a judge, registrar, clerk or other proper officer of the court that made the decree, and

(b) the additional information or material required by regulation.

Comment: Registering a Canadian decree is a purely administrative act.

Effect of registration

4 Subject to sections 5 and 6, a registered Canadian decree may be enforced in [enacting province or territory] as if it were an order of, and entered in, the [superior court of unlimited trial jurisdiction in the enacting province or territory].

Comment: Section 4 describes the effect of registration. It embodies the central policy of the UECDA that Canadian decrees from outside the enacting province or territory should be enforceable as if made by a superior court of the enacting province or territory.

Delay

5 Equitable doctrines and rules of law in relation to delay apply to the enforcement of a Canadian decree.

Comment: Conduct such as delay in seeking enforcement might disentitle the enforcing party to relief.

Application for directions

6 (1) A party to the proceeding in which a registered Canadian decree was made may apply to the [superior court of unlimited trial jurisdiction in the enacting province or territory] for directions respecting its enforcement.

(2) On an application under subsection (1), the court may

(a) make an order that the decree be modified in any manner required to make it enforceable in conformity with local practice,

(b) make an order stipulating the procedure to be used in enforcing the decree,

Comment: Non-money judgments are frequently framed with reference to the enforcement machinery available in the place where they are made. This may not always be compatible with the enforcement machinery and practice in a different province where enforcement is sought. Enforcement of an extra-provincial decree, according to its exact tenor, may be impossible. Section 6(1) provides that a party may apply for directions as to the way in which a decree is to be enforced and gives the enforcing court a generous power to "fine-tune" the decree so that it may be enforced according to its intent.

(c) make an order staying or limiting the enforcement of the decree, subject to any terms and for any period the court considers appropriate in the circumstances, if

(i) such an order could be made in respect of an order of the [superior court of unlimited trial jurisdiction in the enacting province or territory] under [the statutes and the rules of court] [any enactment of the enacting province or territory] relating to legal remedies and the enforcement of orders,

Comment: The enforcing court has the same power to limit the enforcement of an extraprovincial decree as it has with respect to a local decree.

(ii) the party against whom enforcement is sought has brought, or intends to bring, in the province or territory where the decree was made, a proceeding to set aside, vary or obtain other relief in respect of the decree,

(iii) an order staying or limiting enforcement is in effect in the province or territory where the decree was made, or

(iv) the decree is contrary to public policy in [the enacting province or territory].

(2) Notwithstanding subsection (2), the [superior court of unlimited trial jurisdiction in the enacting province or territory] shall not make an order staying or limiting the enforcement of a registered Canadian decree solely on the grounds that

(a) the judge or court that made the decree lacked jurisdiction over the subject matter of the proceeding that led to the decree, or over the party against whom enforcement is sought, under

(i) principles of private international law, or

(ii) the domestic law of the province or territory where the decree was made,

(b) the [superior court of unlimited trial jurisdiction in the enacting province or territory] would have come to a different decision on a finding of fact or law or on an exercise of discretion from the decision of the judge or court that made the decree, or

(c) a defect existed in the process or proceeding leading to the decree.

Comment: This provision gives specific effect to the full faith and credit policy of UECDA.

(4) An application for directions must be made under subsection (1) before any measures are taken to enforce a registered Canadian decree if

(a) the enforceability of the decree is, by its terms, subject to the satisfaction of a condition, or

(b) the decree was obtained without notice to the persons bound by it.

Comment: Subsection (4) sets out particular instances in which directions must be sought. The first is where a decree stipulates that some condition precedent must be satisfied before the decree is enforceable. Typically, a decree might require that a person bound by it receive notice of it before any enforcement proceedings may be taken. The section requires that the enforcing party seek direction as to whether the condition has been satisfied for the purposes of enforcement within the enforcing province. The second instance is where the decree sought to be enforced is an *ex parte* order.

Protection orders

7 Law enforcement authorities acting in good faith may, without liability, rely on and enforce a purported Canadian decree that

(a) was made in a proceeding between spouses or domestic partners having a similar relationship, and

(b) enjoins, restrains, or limits the contact one party may have with the other for the purpose of preventing harassment or domestic violence

whether or not the decree has been registered in the [superior court of unlimited trial jurisdiction in the enacting province or territory] under section 3.

Comment: Protection decrees require some special treatment. In this context, enforcement is not so much a matter of invoking the assistance of the local court as it is in getting local law enforcement authorities to respond to a request for assistance. When the police are called on to intervene in a situation of domestic harassment their response may well turn on whether a valid protection decree exists. If the police are satisfied on this point 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 violence or breach of the peace is beyond doubt.

The strategy of section 7 is to insulate the police from civil liability where they, in good faith, act on what purports to be a valid protection decree. Those jurisdictions which have created and maintain an up-to-date central registry of protection orders on which the police normally rely may wish to consider alternative strategies.

Recovery of registration costs

8 An enforcing party is entitled to recover all costs, charges and disbursements

(a) reasonably incurred in the registration of a Canadian decree under this Act, and

(b) taxed, assessed or allowed by [the proper officer] of the [superior court of unlimited trial jurisdiction in the enacting province or territory].

Comment: Costs and disbursements incurred in the registration of a Canadian judgment are recoverable.

Enforcing party's other rights not affected by registration

9 Neither registering a Canadian decree nor taking other proceedings under this Act affects an enforcing party's right to bring an action on the original cause of action.

Comment: An enforcing party is not required to elect irrevocably between options for enforcing a Canadian decree. Section 9 preserves the right of the enforcing party to employ the UECDA or to rely on whatever common law methods of vindicating rights are available. There is no reason to limit the enforcing party's options.

Power to make regulations

10 The Lieutenant Governor in Council may make regulations [rules of court]

(a) prescribing the fee payable for the registration of a Canadian decree under this Act,

(b) respecting additional information or material that is to be filed in relation to the registration of a Canadian decree under this Act,

(c) respecting forms and their use under this Act, and

(d) to do any matter or thing required to effect or assist the operation of this Act.

Comment: The regulation-making power in section 10 is self-explanatory.

Application of Act

11 This Act applies to

(a) a Canadian decree made in a proceeding commenced after this Act comes into force, and

(b) a Canadian decree made in a proceeding commenced before this Act comes into force and in which the party against whom enforcement is sought took part.

Comment: The application provision permits the retrospective application of the UECDA to some decrees. It may be unfair to enforce, on a full faith and credit basis, a decree made in a proceeding commenced before the UECDA came into force. Unfairness could occur where a resident of the enacting province relied on well-founded legal advice to not respond to distant litigation since any resulting decree would not (according to the law in force at the time) be enforceable outside the place where it was made. On the other hand, if that resident took part in the foreign proceeding there is little reason to deny the plaintiff the right to enforce the decree under the UECDA.

Closing Comments: It is important that Judges and litigants be sensitive to the fact that decrees are now capable of being enforced in other provinces and territories. There is a danger that they will not turn their minds to this question at the time the order is made. They should be encouraged to do that so, where it is appropriate, the court is given an opportunity to limit the geographic ambit of the decree. Consideration might be given to formalizing this process in rules of court.

Appendix B

Uniform Enforcement of Canadian Judgments and Decrees Act

Introductory Comment: The Uniform Enforcement of Canadian Judgments and Decrees Act [UECJDA] embodies the notion of "full faith and credit" in the enforcement of judgments between the provinces and territories of Canada. It involves rejection of two themes which have, in the past, characterized the machinery for enforcing such judgments.

First it rejects the concept of reciprocity. Where the UECJDA has been adopted in province "X", a litigant who has taken judgment in province "Y" may enforce that judgment in province "X" under the legislation whether or not the UECJDA has been adopted in province "Y." This stands in contrast to the approach of the *Uniform Reciprocal Enforcement of Judgments Act* [UREJA].

Second, the Act rejects a supervisory role for the courts of a province or territory where the enforcement of an out-of-province judgment ["Canadian judgment"] is sought. The common law and the UREJA are preoccupied with the question of whether the court which gave the judgment had the jurisdiction to do so. If a Canadian judgment is flawed, because of some defect in the jurisdiction or process of the body which gave it, the approach of the UECJDA is to regard correction of the flaw as a matter to be dealt with in the place where it was made.

As a general rule, a creditor seeking to enforce a Canadian judgment in a province or territory which has enacted the UECJDA should face no substantive or procedural barriers except those which govern the enforcement of judgments of the local courts.

An important feature of UECJDA is that it provides a mechanism for the enforcement of non-money judgments. Apart from legislation that addresses particular types of orders, there is no statutory scheme or common law principle which permits the enforcement in one province of a non-money judgment made in a different province. This is in sharp contrast to the situation that prevails with respect to money judgments which have a long history of enforceability between provinces and states both under statute and at common law. With the increasing mobility of the population and the emergence of policies favouring the free flow of goods and services throughout Canada, this gap in the law has become highly inconvenient. UECJDA provides a rational statutory basis for the enforcement of non-money judgments between the Canadian provinces and territories.

It is important that judges and litigants be sensitive to the fact that non-money judgments are now capable of being enforced in other provinces and territories. There is a danger that they will not turn their minds to this question at the time the order is made. They should be encouraged to do that so, where it is appropriate, the court is given an opportunity to limit the geographic ambit of the judgment. Consideration might be given to formalizing this process in rules of court.

Definitions

1 In this Act

"Canadian judgment" means a judgment, decree or order made in a civil proceeding by a court of a province or territory of Canada other than [enacting province or territory]

(a) requires a person to pay money, including

(i) an order for the payment of money that is made in the exercise of a judicial function by a tribunal of a province or territory of Canada other than [enacting province or territory] and that 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 under section 725 of the *Criminal Code* (Canada) in a court of a province or territory of Canada other than [enacting province or territory]

(b) under 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 under the [appropriate Act in the enacting province or territory],

(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;

(g) is made by a tribunal of a province or territory of Canada other than [enacting province or territory] 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;]

Comment: A central concept of UECJDA is the "Canadian judgment." The term first receives an expansive definition in paragraphs (a) to (c) which is then narrowed by the exclusions that follow. The judgment must have been made in a "civil proceeding."

Paragraph (a) brings in orders for the payment of money. These include certain kinds of "deemed judgments" -- claims which provincial statutes permit to be enforced as judgments although they have not been the subject of formal litigation in a court. Only orders of tribunals which exercise a judicial function qualify for enforcement as "Canadian judgments." The definition does not extend to deemed judgments based on a certificate of an administrator stating that money is owed to an emanation of government. Other orders which are enforceable as Canadian judgments are those made, in the course of a criminal proceeding, in favour of a victim of crime. These orders are authorized by the *Criminal Code* and are enforceable as civil judgments.

Paragraph (b) embraces orders such as injunctions and those for specific performance. Paragraph (c) covers orders that operate to define certain rights or relationships. These might include things like adult guardianship orders. It will also include orders which are purely declaratory. Some kinds of declarations are recognized under current law, but that recognition may be subject to a jurisdictional challenge. Bringing them within the definition ensures that the full faith and credit principle applies to them

Excluded from the definition are types of orders that are the subject of existing machinery for interprovincial enforcement. They include maintenance orders as well as those custody and access in relation to minors. Most Canadian jurisdictions have local legislation respecting the recognition of foreign probates. The exclusion of probate orders therefore is optional and enacting jurisdictions may wish to examine their local legislation and decide whether they wish to rely on that or on UECJDA

The exclusion of judgments for fines and penalties carries forward the current law. They are not presently enforceable either through an action on the judgment or under reciprocal enforcement of judgment legislation.

The exclusion of orders of tribunals, in respect of non-monetary relief ensures that the scheme is confined to true court orders. Non-money orders made by tribunals are often intensely local in the policies they advance and unsuitable for interprovincial enforcement.

Not all judgments which satisfy the definition of "Canadian judgment" may be registered or enforced under the UECJDA. Other limitations are imposed in sections 2 and 5.

"enforcement" includes requiring that a Canadian judgment be recognized by any person or authority whether or not further relief is sought;

"enforcing party" means a person entitled to enforce a Canadian judgment in the province or territory where the judgment was made;

"registered Canadian judgment" means a Canadian judgment that is registered under this Act.

Right to register Canadian judgment

2 (1) Subject to subsection (2) a Canadian judgment, whether or not the judgment is final, may be registered under this Act for the purpose of enforcement.

Comment: This act embraces interim as well as final orders for non-monetary relief. A condition at common law for the enforcement of a foreign judgment was that the judgment had to be final. This requirement of finality is continued in subsection (2) for money judgments. In the context of non-money judgments, other considerations arise.

There is a 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 or maintain the status quo. 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 seems an insufficient reason to deny their enforcement outside the place where the order was made.

Moreover, 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 legislation recognizes this reality.

(2) A Canadian judgment that requires a person to pay money may not be registered under this Act for the purpose of enforcement unless it is a final judgment.

(3) A Canadian judgment that also contains provisions for relief that may not be enforced under this Act may be registered under this Act except in respect of those provisions.

Comment: This ensures that a judgment that provides for other relief is enforceable as to the provisions that are within this Act. For example an order made in a matrimonial proceeding may provide for maintenance, custody of children of the marriage, and limit the contact one spouse may have with the other. The last of those provisions would be enforceable under this Act. The other provisions would be enforced under other schemes.

Procedure for registering Canadian judgment

3 (1) A Canadian judgment is registered under this Act by paying the fee prescribed by regulation and by filing in the registry of the [superior court of unlimited trial jurisdiction in the enacting province or territory]

(a) a copy of the judgment, certified as true by a judge, registrar, clerk or other proper officer of the court that made the judgment, and

(b) the additional information or material required by regulation.

Comment: Section 3(1) sets out the mechanics of registering a judgment under UECJDA. If more detailed guidance is desirable this may be done by regulation. See section 10. Registering a Canadian judgment is a purely administrative act.

(2) Law enforcement authorities acting in good faith may, without liability, rely on and enforce a purported Canadian judgment that

(a) was made in a proceeding between spouses or domestic partners having a similar relationship, and

(b) enjoins, restrains, or limits the contact one party may have with the other for the purpose of preventing harassment or domestic violence

whether or not the judgment has been registered in the [superior court of unlimited trial jurisdiction in the enacting province or territory] under subsection (1).

Comment: Protection orders require some special treatment. In this context, enforcement is not so much a matter of invoking the assistance of the local court as it is in getting local law enforcement authorities to respond to a request for assistance. When the police are called on to intervene in a situation of domestic harassment their response may well turn on whether a valid protection order exists. If the police are satisfied on this point 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 violence or breach of the peace is beyond doubt.

The strategy of subsection (2) is to insulate the police from civil liability where they, in good faith, act on what purports to be a valid protection order. Those jurisdictions which have created and maintain an up-to-date central registry of protection orders on which the police normally rely may wish to consider alternative strategies.

Effect of registration

4 Subject to sections 5 and 6, a registered Canadian judgment may be enforced in [enacting province or territory] as if it were an order or judgment of, and entered in, the [superior court of unlimited trial jurisdiction in the enacting province or territory].

Comment: Section 4 describes the effect of registration. It embodies the central policy of the UECJDA that Canadian judgments from outside the enacting province or territory should be enforceable as if made by a superior court of the enacting province or territory.

Time limit for registration and enforcement

5 (1) A Canadian judgment that requires a person to pay money must not be registered or enforced under this Act

(a) after the time for enforcement has expired in the province or territory where the judgment was made; or

(b) later than [xxx] years after the day on which the judgment became enforceable in the province or territory where it was made.

Comment: The limitation laws of most provinces adopt different limitation period to govern the enforcement of "foreign" judgments than that which governs local judgments. "Foreign" judgments are usually subject to a shorter limitation period. Section 5 embodies the policy that Canadian judgments should be treated no less favourably than local judgments of the enacting province or territory. Thus Canadian judgments should not be subject to any shorter limitation period than local judgments.

In setting a limitation period for the enforcement of judgments under the UECJDA section 5 adopts a dual test. First, enforcement proceedings must be brought within the limitation period applicable to local judgments, with time running from when the judgment was made. Second, proceedings on the judgment must not have become statute barred through the operation of a limitation period in the place where it was made.

xxx refers to the number of years as for enforcement of money judgments of the superior court of unlimited trial jurisdiction in the enacting province or territory.

(2) Equitable doctrines and rules of law in relation to delay apply to the enforcement of a Canadian judgment, to the extent that it provides for relief other than the payment of money.

Comment: Conduct such as delay in seeking enforcement might disentitle the enforcing party to relief.

Application for directions

6 (1) A party to the proceeding in which a registered Canadian judgment was made may apply to the [superior court of unlimited trial jurisdiction in the enacting province or territory] for directions respecting its enforcement.

(2) On an application under subsection (1), the court may

(a) make an order that the judgment be modified as may be required to make it enforceable in conformity with local practice,

(b) make an order stipulating the procedure to be used in enforcing the judgment,

Comment: Non-money judgments are frequently framed with reference to the enforcement machinery available in the place where they are made. This may not always be compatible with the enforcement machinery and practice in a different province where enforcement is sought. Enforcement of an extra-provincial judgment, according to its exact tenor, may be impossible. Section 6(1) provides that a party may apply for directions as to the way in which a judgment is to be enforced. Section 6(2) gives the enforcing court a generous power to "fine-tune" the judgment so that it may be enforced according to its intent.

(c) make an order staying or limiting the enforcement of the judgment, subject to any terms and for any period the court considers appropriate in the circumstances, if

(i) such an order could be made in respect of an order or judgment of the [superior court of unlimited trial jurisdiction in the enacting province or territory] under [the statutes and the rules of court] [any enactment of the enacting province or territory] relating to legal remedies and the enforcement of orders and judgments,

Comment: The policy of assimilating the enforcement of Canadian judgments to that of local judgments requires that the party against whom enforcement is sought be entitled to take advantage of any limitations which the law of the enacting province or territory may impose with respect to the enforcement of local judgments. This might include, for example, a power in the local court to order payment by instalments. Section 6(1)(a) clarifies the power of the local court to make orders of this character which limit the enforcement of a Canadian judgment.

(ii) the party against whom enforcement is sought has brought, or intends to bring, in the province or territory where the Canadian judgment was made, a proceeding to set aside, vary or obtain other relief in respect of the judgment,

(iii) an order staying or limiting enforcement is in effect in the province or territory where the Canadian judgment was made, or

(iv) is contrary to public policy in [the enacting province or territory].

Comment: An order made under section 6(2)(c) staying or limiting enforcement may be made for a temporary period and subject to any terms which may be necessary to protect the enforcing party's position. If an order is made under paragraph (ii), terms might be imposed to ensure that the party against whom enforcement is sought proceeds expeditiously. The court may, for example, set time limits or require the posting of security.

(3) Notwithstanding subsection (2), the [superior court of unlimited trial jurisdiction in the enacting province or territory] shall not make an order staying or limiting the enforcement of a registered Canadian judgment solely on the grounds that

(a) the judge, court or tribunal that made the judgment lacked jurisdiction over the subject matter of the proceeding that led to the judgment, or over the party against whom enforcement is sought, under
  (i) principles of private international law, or
  (ii) the domestic law of the province or territory where the judgment was made,
(b) the [superior court of unlimited trial jurisdiction in the enacting province or territory] would have come to a different decision on a finding of fact or law or on an exercise of discretion from the decision of the judge or court that made the judgment, or
(c) a defect existed in the process or proceeding leading to the judgment.

Comment: This provision gives specific effect to the full faith and credit policy of UECJDA. At common law, a local court whose assistance is sought in the enforcement of a foreign judgment may decline to give that assistance where it believes the foreign judgment is somehow flawed. In this context, a flaw might involve a lack of jurisdiction in the foreign court over the defendant or the dispute. It might, in some cases, involve the local court having a different view of the merits of the decision. A flaw might also include some defect in the process by which the foreign judgment was obtained such as a breach of natural justice or where there is a suggestion of fraud. Allowing the local court to inquire into such matters may be appropriate where the judgment emanates from a truly "foreign" place. It is quite inappropriate in Canada as it puts the courts of one province in the position of supervising the actions of the courts of another province. The Common law approach cannot co-exist with the full faith and credit concept.

UECJDA expressly abrogates the common law approach. Section 6(3) stipulates that none of the "flaws" described above provide grounds for staying or limiting the enforcement of a Canadian judgment. The proper course of a judgment debtor who alleges that the judgment is flawed is to seek relief in the place where the judgment was made, either through an appeal or a further application to the court or tribunal which made the judgment.

UECJDA does recognize that there are other circumstances which might justify staying or limiting the enforcement, such as where the judgment is truly flawed, and the judgment debtor is taking steps to obtain relief in the place it was made. This is provided for in section 6(2)(c)(ii). The judgment debtor is likely to have a stronger claim for a stay if enforcement of the judgment has also been stayed in the place where it was made. See section 6(2)(c)(iii).

(4) An application for directions must be made under subsection (1) before any measures are taken to enforce a registered Canadian judgment where

(a) the enforceability of the judgment is, by its terms, subject to the satisfaction of a condition, or
(b) the judgment was obtained ex parte without notice to the persons bound by it.

Comment: Subsection (4) sets out particular instances in which directions must be sought. The first is where a judgment stipulates that some condition precedent must be satisfied before the judgment is enforceable. Typically, a judgment might require that a person bound by it receive

notice of it before any enforcement proceedings may be taken. Section 6(4) requires that the enforcing party seek directions as to whether the condition has been satisfied for the purposes of enforcement within the enforcing province. The second instance is where the judgment sought to be enforced is an ex parte order.

Interest on registered judgment

7 (1) To the extent that a registered Canadian judgment requires a person to pay money, interest is payable as if it were an order or judgment of the [superior court of unlimited trial jurisdiction in the enacting province or territory].

(2) For the purpose of calculating interest payable under subsection (1), the amount owing on the registered Canadian judgment is the total of

(a) the amount owing on that judgment on the date it is registered under this Act; and

(b) interest that has accrued to that date under the laws applicable to the calculation of interest on that judgment in the province or territory where it was made.

Comment: Section 7 provides that a registered judgment will earn interest as if it were a local judgment. The principal amount of the judgment is calculated by including post judgment interest that has accrued before registration.

Recovery of registration costs

8 An enforcing party is entitled to recover all costs, charges and disbursements

(a) reasonably incurred in the registration of a Canadian judgment under this Act, and

(b) taxed, assessed or allowed by [the proper officer] of the [superior court of unlimited trial jurisdiction in the enacting province or territory].

Comment: Costs and disbursements incurred in the registration of a Canadian judgment are recoverable.

Enforcing party's other rights not affected by registration

9 Neither registering a Canadian judgment nor taking other proceedings under this Act affects an enforcing party's right to bring an action on the original cause of action.

Comment: An enforcing party is not required to elect irrevocably between options for enforcing a Canadian judgment. Section 9 preserves the right of the enforcing party to employ the UECJDA or to rely on whatever common law methods of vindicating rights are available. There is no reason to limit the enforcing party's options.

It is contemplated that some provinces and territories will retain legislation for the reciprocal enforcement of judgments. While this legislation will be overtaken by the UECJDA with respect to Canadian judgments it will still be necessary as a vehicle for the enforcement of judgments, on a reciprocal basis, with non-Canadian jurisdictions.

Power to make regulations

10 The Lieutenant Governor in Council may make regulations [rules of court]

(a) prescribing the fee payable for the registration of a Canadian judgment under this Act,

(b) respecting additional information or material that is to be filed in relation to the registration of a Canadian judgment under this Act,

(c) respecting forms and their use under this Act, and

(d) to do any matter or thing required to effect or assist the operation of this Act.

Comment: The regulation-making power in section 10 is self-explanatory.

Application of Act

11 This Act applies to

(a) a Canadian judgment made in a proceeding commenced after this Act comes into force, and

(b) a Canadian judgment made in a proceeding commenced before this Act comes into force and in which the party against whom enforcement is sought took part.

Closing Comments: The application provision permits the retrospective application of the UECJDA to some judgments. It may be unfair to enforce, on a full faith and credit basis, a judgment made in a proceeding commenced before the UECJDA came into force. Unfairness could occur where a resident of the enacting province relied on well-founded legal advice to not respond to distant litigation since any resulting judgment would not (according to the law in force at the time) be enforceable outside the place where it was made. On the other hand, if that resident took part in the foreign proceeding there is little reason to deny the plaintiff the right to enforce the judgment under the UECJDA.