Interprovincial Enforcement of Maintenance Orders: New Principles, New Approaches

Lynn Walsworth

Clark & Company

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/dlj

Part of the Family Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.
Lynn Walsworth*  
Interprovincial Enforcement of Maintenance Orders: New Principles, New Approaches

The author points out that the existing legislative scheme for interprovincial enforcement of maintenance orders is premised on common law rules which have now been rejected by the Supreme Court of Canada. Those same Supreme Court decisions have opened the door for new legislative approaches to intra-Canadian enforcement of these obligations. This paper surveys a variety of new responses based on models in other federal states and on conventions implementing international maintenance enforcement schemes. It examines the pros and cons of each and concludes that any one of them would be superior to the scheme now in force in Canada.

L'auteur trouve que le système actuel législatif pour l'exécution interprovinciale des pensions alimentaires est basé sur les règles de common law qui ont été rejetées par la Cour suprême du Canada. Ces mêmes décisions de la Cour suprême ont facilité des nouvelles modalités d'application législatives pour l'exécution de ces obligations au Canada. Cet article examine une variété de réponses nouvelles basées sur des modèles existants en d'autres états fédéraux et sur les conventions internationales d'exécution des régimes des pensions alimentaires. Cet article examine aussi les bénéfices et les limitations de chaque système et juge que n'importe quel serait supérieur au système maintenant en vigueur au Canada.

Introduction

Receipt of child and spousal support is crucial to the wellbeing of many members of our society, especially women. Figures contained in the evidence before the Supreme Court of Canada in 19941 demonstrated that in situations of separation or divorce where support is payable by one spouse to the other, either for the benefit of the spouse or the children or both, the vast majority (around ninety-eight percent) of payor spouses are male. Adequate living standards for parents and children is a people's issue, and certainly a government issue, however it is hard to think of maintenance orders as anything but a woman's issue.

* Lynn Walsworth is a lawyer with Clark & Company in Fredericton, New Brunswick. The author gratefully acknowledges the support of the Atlantic Canada Ministers Responsible for the Status of Women in making this paper possible.

Maritimers are familiar with, and still chuckle about, the “Frank’s the Father” campaign waged by provincial N.D.P. leader Elizabeth Weir a few years ago when the premier of New Brunswick, Frank McKenna, announced a provincial campaign to persuade single welfare mothers to reveal the name of the father of their child in order to force more delinquent fathers to pay their child support. But the enforcement of spousal and child support orders is no joke. As evidenced by the formerly commonplace expression “Dead-beat Dad”, it used to be hard enough to enforce support orders when the payor spouse lived in the same province as the payee and had been a party all along to the proceedings in which the support order was made. The good news is that, in this intraprovincial context, the percentage of child support orders that can be and are enforced is rising each year as provincial regulation and enforcement schemes become more precise, better organized and above-all computerized. The bad news is that, when it comes to maintenance orders made under provincial legislation in situations where the payor spouse lives out of the province, especially where that payor spouse was not present and did not take part in the proceedings from which the order arose, enforcement can be difficult, and sometimes impossible. It may be that the reluctance of Canadian legislators to revisit this problem in light of new approaches adopted elsewhere is due to the legislators’ lack of realization of the limitations of the current scheme, or to lack of government resources to devote to the task. Today, however, as Premier McKenna’s campaign demonstrated, there is more than the altruism of caring for needy spouses and children at stake. Scarcce government resources could be saved by a more workable interprovincial scheme. In the United States, where the former interstate support legislation, the Uniform Reciprocal Enforcement of Support Act was developed a decade later than in Canada, this has always been a concern. David Cavers summarized the fiscal interest of government:

Breaking through jurisdictional barriers is not easy when claimants have economic resources enabling them to carry the burden of litigation. However, maintenance claimants are often poor, frequently on welfare. In economic terms, government becomes a party in interest, concerned lest resident claimants become public charges. And, if claimants are already on relief, the state may seek reimbursement from delinquent providers for the funds it has advanced to their dependents.3

2. 9 U.L.A. 805 (1973) [hereinafter URESA]. This model statute was promulgated by the National Conference on Commissioners on Uniform State Laws in 1950 and has been revised and amended a number of times since then. All American states enacted some version of URESA.
This paper will examine the deficiencies in the current Canadian scheme, the applicable principles to be gleaned from the Supreme Court of Canada's 1990s conflict of laws trilogy, recent developments in the United States, the Hague Conventions on support for children and collaterals, and the Australian approach. From these examinations, this paper will make suggestions for a new Canadian enforcement of maintenance orders statute to apply within the Canadian federation.

1. The Current Legislation and Conflict of Laws Background

The statutory basis on which recognition and enforcement of maintenance orders is currently accomplished is the *Reciprocal Enforcement of Maintenance Orders Act*, uniform legislation adopted by all the provinces and both territories. The problem with REMO legislation, in a nutshell, is that it is based on the concept of the ten provinces of Canada as being ten separate countries for the purpose of their judicial systems. Such a concept reflects the nineteenth- and early twentieth-century view of the Privy Council rather than the current view, even among decentralist Canadians. In addition, it arguably does not reflect the provisions of our Constitution. In fact, as La Forest J. stated in *Morguard*,

---


5. For a nutshell description of the law on the enforcement of foreign maintenance orders in federations and unitary states in the Western world as it stood in the mid-1980s, see G.F. DeHart, *International Enforcement of Child Support and Custody* (n.p.: American Bar Association, 1986) at 1-21. The internal Australian approach, being based on federal law, is less directly relevant to the present endeavour than are the American and European approaches. Nonetheless, it contains some components that are valuable to examine when designing a new Canadian system. For that reason, it will be examined at the end of this paper. As will be seen, the current Canadian scheme is more restrictive than the current American legislative scheme for interstate maintenance orders, more restrictive than the Australian interstate scheme, and even more restrictive than the international scheme set forth in the current Hague convention of 1973. There is renewed interest internationally in the enforcement of maintenance orders. On 10 June 1996, Canada and France signed a Convention for *The Recognition and Enforcement of Judgments in Civil and Commercial Matters and on Mutual Legal Assistance in Maintenance* [unpublished, not yet in force], including, as Chapter III, *Cooperation for the Recovery of Maintenance* between the two countries. Although a new international treaty obviously has implications for the individual provinces, this treaty is unfortunately beyond the scope of this paper.

there is really no comparison between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century. Indeed, in my view, there never was and the courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister-provinces. . . .

In any event, the English rules seem to me to fly in the face of the obvious intention of the Constitution to create a single country. This presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction. A common citizenship ensured the mobility of Canadians across provincial lines, a position reinforced today by s. 6 of the Charter . . . .

These [constitutional] arrangements themselves speak to the strong need for the enforcement throughout the country of judgments given in one province. But that is not all. The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges—who also have superintending control over other provincial courts and tribunals—are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada, which can determine when the courts of one province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments. Any danger resulting from unfair procedure is further avoided by sub-constitutional factors, such as for example the fact that Canadian lawyers adhere to the same code of ethics throughout Canada. . . .

These various constitutional and sub-constitutional arrangements and practices make unnecessary a “full faith and credit” clause such as exists in other federations, such as the United States and Australia.7

In Morguard, the defendant bought property in Alberta but then moved to British Columbia. The mortgage fell into default and the plaintiff, a financial institution, sued the defendant in Alberta. The defendant, although he was properly served notice of the proceeding according to

---

7. Morguard, supra note 4 at 1098-100.
Alberta’s service *ex juris* rules, neither put in an appearance nor submitted in any other way to the jurisdiction of the Alberta court. Application of the old common law principles would have resulted in the plaintiff’s being unable to recover. The lower courts experimented with different conflict of laws theories through which to correct this obvious injustice, and the Supreme Court of Canada settled the issue by the application of constitutional norms to “new” common law, holding that British Columbia should enforce the Alberta judgments since the province of Alberta had a real and substantial connection to the subject matter of the litigation.

The common law enunciated in *Morguard* provides a complete, although inchoate, scheme for the recognition and enforcement of final ordinary commercial Canadian judgments, and it is arguable that remedial legislation on the substantive law issues is unnecessary in this field. However, the common law does not now and never did have the ability to come to the rescue of a maintenance order creditor as it came to the rescue of the judgment creditor in *Morguard*. This is because the new common law principles apply, as did the old ones, only to final judgments. Support orders, being always open to an application to vary based on changing means and needs of the parties, are never considered “final” in the same sense as a commercial judgment can be final. Only judgments for arrears in alimony are considered final. Thus, in the absence of legislative intervention, a maintenance creditor would have to let the arrears build up, and then sue on them. Once she recovered one set of arrears, she would have to let the arrears build up again, and then sue again. This highly impractical system undoubtedly discouraged many would-be litigants from pursuing their claims, and it was this problem that led the predecessor of the Uniform Law Conference to develop REMO.

8. This has not prevented the Uniform Law Conference from promulgating, in 1991, a *Uniform Enforcement of Canadian Judgments Act*, intended to replace the *Uniform Reciprocal Enforcement of Judgments Act*. However, it differs from the common law of *Morguard* in several important ways, as will be referenced in passing later in this paper. The uniform Act has been heavily criticized: see J. Swan, “The Uniform Enforcement of Canadian Judgments Act” (1993) 22 Can. Bus. L.J. 87; and V. Black, “Uniform Enforcement of Canadian Judgments Act; Uniform Law Conference of Canada (1991); Enforcement of Canadian Judgments Act, S.B.C. 1992, c. 37” (1993) 71 Can. Bar Rev. 721; and contra, A. Close (B.C.’s representative on the Uniform Law Conference), “Criticism of the Uniform Enforcement of Canadian Judgments Act” in Uniform Law Conference of Canada, *Proceedings of the Seventy-Fifth Annual Meeting* (Ottawa: Uniform Law Conference of Canada, 1993) at 121. These commentaries are relevant to the present endeavour in that any new REMO proposals should take into account the traps into which the *Uniform Enforcement of Canadian Judgments Act* allegedly falls.

9. See Castel, *supra* note 6 at 161-2 and cases cited therein. And if the original court has the power to vary the arrears then even a judgment for arrears may not be considered final: *Macguire v. Macguire* (1921), 50 O.L.R. 100, 64 D.L.R. 180 (S.C. A.D.).
Our current REMO Acts are a considerable improvement over the common law. They provide a two-tier scheme wherein an order can be either final or provisional. A final order is one made in circumstances wherein the respondent had either proper notice or an opportunity to be present or represented. If these criteria are fulfilled, the legislation provides that the order will be recognized and can be enforced without further proceedings in a reciprocating province or territory. A provisional order, on the other hand, is one in which these two criteria are not fulfilled. In order for a provisional order to be enforced, it must first be confirmed by an order of the court of the receiving province having jurisdiction over the person liable to pay. At a hearing to confirm a provisional order, the court being asked to grant the confirmation can remit the matter to the original court for further evidence, if necessary. Once evidentiary matters are dealt with, the receiving court may decide to accept the order in its entirety, to vary it, or to dismiss. There is no obligation on the receiving court to take into account the same considerations that the original court did. If the receiving court decides to accept the order or to vary it, the resulting order becomes final and is registered for enforcement.

Once an order has been registered, the person against whom it was made has one month after receiving notice of the registration in which to apply to the registering court to have the registration set aside. Upon such application, the reviewing court must set the registration aside if the court in the original state acted without jurisdiction over the person against whom the order was made, according to the conflict of laws rules of the receiving state, or if the judgment was obtained by fraud or error. Also, in a confirmation proceeding, the respondent may raise any issue that he might have raised in the original proceeding.\[10\]

The confirmation of a provisional order does not affect the ability of the original court to vary or rescind that order. But such variation or rescission, to be effective in the receiving state, must be subject to a successful confirmation hearing. Alternatively, a confirmed order may be varied or rescinded by the receiving court as if it had originally been made by that court. In addition, the person bound by the confirmation order may appeal it, as may the claimant, if the confirming court has made an order unfavourable to her. The result of this system of possible modification by two or more different provinces is that there may be in effect at any one time more than one support order relating to the same set of facts. The confusion resulting from this situation is clearly undesirable.

---

Interprovincial Enforcement of Maintenance Orders

It is apparent that REMO is designed, as Castel puts it, "to follow the husband by reaching him in a reciprocal jurisdiction, where the wife is residing in the jurisdiction from which the husband has fled."11 The court with the real power in interprovincial cases is the court of the jurisdiction wherein the respondent resides. The REMO scheme mirrored the common law principles regarding the assumption of jurisdiction laid out in Emanuel v. Symon.12 The development of these principles and their application in Canada are described in detail in Morguard and will not be repeated here, but in short, in the pre-Morguard Canadian world, as in the nineteenth-century English one, a judgment of one Canadian province would be recognized in another only if the original court had physical control over the defendant. This event occurred if the defendant was either present in the court's territory when served, or voluntarily submitted to the court's jurisdiction.

This "presence and submission" common law rule of jurisdiction protected defendants living (or hiding) in England from the long-arm reach of foreign courts. The rule was developed partly out of genuine considerations of fairness to defendants (so as not to force them to travel to the foreign jurisdiction, which might be half a world away),13 and partly because of the parochial English view that English law and English procedure were the best in the world: if a foreign court had issued a judgment, it was dubious (to the English) whether that judgment was properly granted, both in law and in procedure.14 Needless to say, under these rules the enforcement of many perfectly valid judgments was thwarted because the defendant, living in one jurisdiction, refused to make himself present or to voluntarily submit to the courts of another jurisdiction.

The exception to the presence and submission rule was the principle of reciprocity, common at international law (and chosen as the preferred approach by the British Columbia Court of Appeal in Morguard15). This principle provides that a court in state B will recognize the judgment of a court in state A if the court in state A took jurisdiction over the cause of action in a situation in which, in the same circumstance, the court in state

---

11. Castel, ibid. at 177.
13. The defendant in Emanuel v. Symon, ibid., carried on business in Western Australia and later moved to England. Such a trip was a journey of weeks or months in the 19th century.
14. For a rather candid view of the parochial bias of the English towards their law, see the comments of La Forest J. in Tolefson, supra note 4 at 1053.
B would also have taken jurisdiction. The Supreme Court of Canada in \textit{Morguard} rejected the application of reciprocity to intra-Canadian judgments as being inappropriate in a federal state. According to \textit{Morguard}, for a court to assume jurisdiction, there must be a real and substantial connection between the forum and the cause of action. The court began its consideration of what makes a connection real and substantial with the traditional starting place, a province's service \textit{ex juris} rules. But one of the innovations of \textit{Morguard} was that the service \textit{ex juris} rules provided only a starting point. First the court noted that the service \textit{ex juris} rules in question did not cover all the circumstances in which jurisdiction would result; secondly, in other provinces with \textit{ex juris} rules allowing almost unlimited service, circumstances would occur in which, notwithstanding the proper application of the service \textit{ex juris} rules, jurisdiction in the forum would not be properly founded.

The Supreme Court in \textit{Morguard} did not attempt to exhaustively list circumstances wherein a real and substantial connection might be found. The Court deliberately left these to develop as the common law evolved. However, it appears that these criteria will involve the people, places, and subject matter of the claim, and will involve a weighing of factors and connections. It may be, under this system, that more than one province would bear a real and substantial connection to the cause of action under the \textit{Morguard} test. The determination of the appropriate forum would then proceed by application of the \textit{forum non conveniens} test summarized

16. For an example, see the \textit{Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligation} (2 October 1973), in Hague Conference on Private International Law, \textit{Recueil des conventions/Collection of Conventions} (1951 - 1988) (The Hague: Permanent Bureau of the Conference, 1989) at 202 [hereinafter \textit{Collection of Conventions}]. Article 4: "Provisionally enforceable decisions and provisional measures shall, although subject to ordinary forms of review, be recognised or enforced in the State addressed if similar decisions may be rendered and enforced in that State." The Australian approach to international cases is also based on reciprocity (s. 110 of the \textit{Family Law Act} 1975 (Cth) and \textit{Family Law Regulations} 1984 (Cth), ss. 139-156 in Part XVI). An order coming from outside Australia is labelled "provisional", and the Act provides that "This order is provisional only unless and until confirmed by a court of competent jurisdiction in Australia." See DeHart, \textit{supra} note 5.

17. \textit{Morguard}, \textit{supra} note 4 at 1089. This traditional theory of jurisdiction held that, if a defendant could be properly served, jurisdiction would usually result. The development and philosophy of this rule is told by C. Walsh, Case Comment on \textit{Hunt v. T&N plc} (1994) 73 Can. Bar Rev. 394 at 405 ff.

18. None of the current provincial service \textit{ex juris} rules offer any help in laying out criteria for the assumption of jurisdiction in an interprovincial maintenance case. Most provinces' rules merely provide that a respondent can be served \textit{ex juris} if he is the subject of a claim for maintenance; see, for example, the New Brunswick Rules of Court, r. 19.01(k). This does not help us decide whether the principles of order and fairness are satisfied by the forum court taking jurisdiction over the particular cause of action.
Interprovincial Enforcement of Maintenance Orders

in Amchem Products Inc. v. British Columbia (Workers' Compensation Board).¹⁹

Given the adoption, without question, of the presence and submission limitations on the assumption of jurisdiction by the drafters of REMO fifty years ago in Canada, it is probable that the old British views regarding the protection of defendants/respondents and the sanctity of the law of the receiving state were foremost in the minds of these drafters. This mind-set goes hand in hand with the old legal assumption that, for the purpose of the conflict of laws, Canadian provinces were to be treated separate countries.

Even today, we must recognize that Canadian enforcement of maintenance orders legislation cannot ignore the genuine concerns of fairness to both parties in a maintenance claim: such legislation must take into account circumstances in which it may not be fair to impose upon one party the inconvenience of travel to far corners of our vast country in order to pursue or to defend a claim. However, as to the other common law consideration, the superiority of forum law, La Forest J. warns us against adherence to the mind-set that the law or procedure of another Canadian province may be suspect. In Morguard he stated: “The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation.”²⁰

In Tolofson, the Supreme Court again rejected the argument that the public policy of one province might prevent it from applying the law of another province. These statements about the role of public policy in intra-Canadian cases are, of course, equally applicable to jurisdictional questions and questions of recognition and enforcement as they are to choice of law:

[G]iven the fact that the jurisdiction of Canadian courts is confined to matters in respect of which there is a real and substantial connection with the forum jurisdiction, I seriously wonder whether the requirement [of the old common law choice of law rule] that the wrong be actionable in that jurisdiction is really necessary. It may force or persuade litigants who are within the territorial jurisdiction of the court to sue elsewhere even though it may be more convenient for all or most of the parties to sue here. The fact that a wrong would not be actionable within the territorial jurisdiction of the forum if committed there might be a factor better weighed in considering the issue of forum non conveniens or, on the international plane, whether entertaining the action would violate the public policy of the forum jurisdiction. Certainly, where the place of the wrong and the forum are both within Canada, I am convinced that the application of the forum non conveniens doctrine should be sufficient. I add that I see a limited role,

²⁰. Supra note 4 at 1099-100.
if any, for considerations of public policy in actions that take place wholly within Canada.\textsuperscript{21}

\textit{Morguard} itself was quite explicit about the constitutional nature of the new conflicts doctrine. La Forest J. declared that, irrespective of reciprocity, one Canadian province must recognize and enforce the judgments of another Canadian province out of constitutional obligation. He stated:

As I see it, the courts of 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 a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action.\textsuperscript{22}

And if there were any doubt about the constitutional nature of the new \textit{Morguard} doctrine of recognition and enforcement, it was expelled by the Supreme Court in \textit{Hunt}, where La Forest J. stated:

In any event, I indicated [in \textit{Morguard}] that the traditional rules emphasizing sovereignty seem to “fly in the face of the obvious intention of the Constitution to create a single country”. Among the factors I identified that would also support a more cooperative spirit in recognition and enforcement were (1) common citizenship, (2) interprovincial mobility of citizens, (3) the common market created by the union as reflected in ss. 91(2), 91(10), 121 and the peace, order and good government clause, and (4) the essentially unitary structure of our judicial system with the Supreme Court of Canada at its apex .... \textsuperscript{23}

To this end, the lesson from La Forest J.’s trilogy of conflicts cases is that, as long as a Canadian court has properly assumed jurisdiction over a cause of action, the judgment issuing from that court should be enforced without question by the courts of another province. The courts of one province should not question the public policy or the application of the principles of natural justice by another province. Jurisdiction is the only thing that can be questioned, and only then within severe limits.\textsuperscript{24}

Reciprocity is not necessary under this approach, because the new

\begin{itemize}
\item\textsuperscript{21} Tolofson, supra note 4 at 1054-5 [emphasis added].
\item\textsuperscript{22} Morguard, supra note 4 at 1102.
\item\textsuperscript{23} Hunt, supra note 4 at 322.
\item\textsuperscript{24} The Uniform Law Conference in its \textit{Uniform Enforcement of Canadian Judgments Act} has gone one step further than full faith and credit, wherein jurisdiction is still open to examination by the receiving province, and has instead drafted what has been described as “blind faith and credit”, wherein jurisdiction is not to be questioned. Arthur Close, supra note 8 at 123, has argued that the Conference’s approach was intentional and is a valid one. But the fact that, to date, only two provinces, B.C. and P.E.I., have adopted the uniform Act may indicate that the “blind faith and credit” approach does not attract widespread favour. In Québec, the new Civil Code (art. 3158) provides that there will not be review of foreign decisions on the merits in Québec. Nonetheless, Québec courts must still strictly verify the jurisdictional competence of the foreign court in accordance with Québec law (art. 3155): see G. Goldstein & J. Talpis, “Les perspectives en droit civil québécois de la réforme des
approach is constitutionally mandated. If the constitution demands that province A enforce the judgments of province B without questioning their substance, then it must enforce them, without consideration of whether province B will do the same for province A. But, of course, province B will do the same, if it recognizes and accepts its constitutional obligation.  

The application of the constitutional principles outlined above to judgment recognition in our federation is not just an idea whose time has come politically and in legal theory, it is also, as La Forest J. points out in Morguard and reiterates in Tolofson, an idea whose time has come technologically. Notwithstanding the above comments on fairness, it is arguable that Canada has reached the stage in its technological development that the physical barriers separating the regions of our country and the sheer distances involved no longer represent the problems and the extreme inconvenience they once did. Airline travel has become commonplace: if a respondent or a claimant wants to attend a hearing in person, planes come and go from most areas of the country every day. And for cases in which the expense of airline travel is obviously too great for the parties to bear, a court of the future may even have video-conferencing available, as such technology becomes more commonplace. In addition, the technology exists to enable a party to easily instruct counsel in another province. The existence of interprovincial law firms, the availability and ever-decreasing expense of long-distance telephone service, the fax machine, and e-mail all reduce the barriers to effective representation at an out-of-province hearing.


25. In the field of the enforcement of ordinary commercial judgments, New Brunswick is one of two provinces to have enacted the Uniform Foreign Judgments Act, the other province being Saskatchewan, thus precluding the application of the Morguard principles. See respectively Foreign Judgments Act, R.S.N.B. 1973, c. F-19; and The Foreign Judgments Act, R.S.S. 1978, c. F-18. Academic critics have understandably questioned the constitutional validity of the interprovincial application of the Foreign Judgments Act: C. Walsh, “Private International Law—Jurisdiction and Recognition of Judgments—Hunt v. T&N PLC” (1994) 10:2 Solicitor’s J. 17; and Case Comment on Hunt v. T&N plc, supra note 17. The 1996 New Brunswick Throne Speech announced that the Foreign Judgments Act is to be amended, but the amendments have not yet been introduced.

26. The technology is now used to conduct some motions at the Supreme Court of Canada, especially when individuals in a criminal matter represent themselves. Although not ideal, as the camera focuses on only one face at a time and hence the full flavour of a complicated matter is not necessarily conveyed, the technology will undoubtedly be improved in the coming years. However, whether its use will ultimately be expanded to family courts across the nation will probably depend on the amount of money increasingly cash-strapped governments can apply to such a program. And this, like other changes to the Canadian scheme of enforcement of maintenance orders, depends on the political will.
II. Alternative Approaches for Maintenance Orders

To accomplish the goal of arriving at a simpler system of recognition and enforcement, necessitating less time and money expended on litigation, less waiting and less stress for parties separated by provincial barriers, this paper elaborates three models of recognition and enforcement systems for maintenance orders. Each is based on the principle that, in the vast majority of cases, only one hearing should be necessary, and only one order would ensue. That order would, if made in accordance with the provisions of any of the proposed systems, be recognized and enforced without further process by the receiving province. The concept of provisional and final orders contained in REMO would be eliminated in the vast majority of cases. In any of the three approaches presented here, whichever court both correctly and appropriately assumes jurisdiction (to use the terminology of Morguard) would issue the maintenance order, and courts of the other provinces should, without exception, enforce it, not because of reciprocity but by constitutional imperative.

Each of these three options will be presented separately. In each, the substantive law issues will be framed as follows: (1) What factors will determine the jurisdiction of a court to make an original order? What role should the doctrine of forum non conveniens play? What factors will determine the jurisdiction of a court to modify or dismiss an existing order? (2) What law should govern the cause of action (the choice of law question)? (3) Are a registration scheme and a waiting period necessary?

It is useful before plunging into the details to present a brief summary of the three approaches. Under the first option, the modified common law approach, the legislation would lay out the jurisdictional rules in a broad, relatively vague fashion, resembling the real and substantial connection test of Morguard. It would be implicit that the appropriate forum would be determined by courts on a case by case basis by examining arguments of forum conveniens. The modified common law approach provides the minimum legislative treatment necessary of the substantive conflict of laws principles, leaving the development of rules to cover most specific circumstances to case law.


---

27. Collection of Conventions, supra note 16 at 36. This is in force in nineteen states but Canada is not among them.
Interprovincial Enforcement of Maintenance Orders

Obligations. Under this second approach, jurisdictional rules would be laid out in more detail than in the modified common law approach, and once a court assumed jurisdiction properly its order would be recognized and enforced in all provinces without further review. However, there might still be factual circumstances which would fall outside the confines of the statute; in such a case, resort to the common law might be necessary. This approach provides a medium amount of legislative treatment.

The third option is the American approach. Under this model, a very specific, exclusive list of jurisdictional rules would be laid out. This list would encompass all conceivable convenience factors and real and substantial connections. There would be only one province or territory that met the criteria of the statute for obtaining jurisdiction. The statute would provide that the doctrine of forum non conveniens would have no application. The province or territory properly taking jurisdiction would hear and decide the matter, including variation or dismissal of an existing order, to the exclusion of all others. This approach provides the maximum legislative treatment.

1. Jurisdiction, forum non conveniens and Variation of Orders

a. The Modified Common Law Approach

Under this approach, criteria for the assumption of jurisdiction would be laid out on broad grounds, along the lines of real and substantial connection. As with ordinary litigation with extra-provincial elements under the Morguard test, this might result in several different provinces having the right to assume jurisdiction over the same cause of action. In a maintenance case, these might be, for example, the province where the respondent resides, the province where the subject of the maintenance claim resides (whether child or spouse), or the province where the obligation was incurred (for example, where the couple lived during their relationship). All these circumstances might be thought to sustain a real and substantial connection between the forum and the cause of action. The claimant (or applicant in case of a variation request) would generally chose the initial forum.

Once it was established that the province of the claimant’s choice could legally claim jurisdiction, it would be for the respondent to put in

28. Supra note 16. In force in seventeen countries but not Canada. The 1958 Convention covers only maintenance obligations to children, while the 1973 one covers both obligations to children and those to spouses and ex-spouses. The official version of the first convention exists only in French. Beginning in 1961, the Hague Convention produced official versions of Conventions in both French and English.
an appearance in that forum to litigate the issue of *forum non conveniens* if he preferred to have the matter heard in a different court. The criteria for determining whether a forum is *forum conveniens* are elaborated upon in *Amchem*. These include expense, inconvenience or hardship to one of the parties (including when the claimant’s choice of a forum is abusive or vexatious to the respondent), and juridical advantage or disadvantage, including the difficulty in proving the proper law in the putative forum state. While *Amchem* involved product liability litigation in the international context, the words of Sopinka J. can by analogy be applied to maintenance cases:

With the increase of free trade and the rapid growth of multi-national corporations it has become more difficult to identify one clearly appropriate forum for this type of litigation. The defendant may not be identified with only one jurisdiction. ... Frequently, there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives. ... This does not mean, however, that “forum shopping” is now to be encouraged. The choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate.

After this introductory statement, Sopinka J. went on to discuss the history and current state of the law of *forum non conveniens*, and to state the criteria that a court should apply. He noted that the onus was on the defendant to demonstrate that there was another forum which was clearly more appropriate for the pursuit of the action. Once this is established the onus shifts to the plaintiff to show that depriving it of its chosen forum would be unjust.

When will it be unjust to deprive the plaintiff in the foreign proceeding of some personal or juridical advantage that is available in that forum? I have already stated that the importance of the loss of advantage cannot be assessed in isolation. The loss of juridical or other advantage must be considered in the context of the other factors. The appropriate inquiry is whether it is unjust to deprive the party seeking to litigate in the foreign jurisdiction of a judicial or other advantage.

This discussion gives little concrete guidance to those considering the convenience and inconvenience factors in a case of interprovincial maintenance litigation; it is not meant to. The whole approach is, as in

---

Interprovincial Enforcement of Maintenance Orders

Morguard, to let the common law develop to take care of individual circumstances. While this may result in increased litigation at first, it is thought that the law will stabilize in time and a set of defined conditions will develop.

Under the modified common law approach to maintenance orders, after both jurisdiction and forum non conveniens were decided, the litigation would proceed upon the merits. The chosen forum would then, because of the constitutional imperatives described above, function as the only forum that could both correctly and appropriately issue a maintenance order in that case. Courts of other provinces should enforce the resulting order without question, and without the necessity of a second hearing.

Determination of jurisdiction to entertain a claim for variation or dismissal of an existing order could work in one of two ways. It could proceed along the same principles as determination of original jurisdiction. In other words, it would be open to the respondent on a request by either party to vary or rescind to convince any court to which the request was directed that the court was not forum conveniens. Alternatively, the legislation could declare that the court of original jurisdiction maintained jurisdiction to vary or dismiss its own order to the exclusion of all other courts, unless that court could be convinced that it was no longer forum conveniens. This is to say that all requests for variation or dismissal of an original order could only be made to the original court, and only when physical circumstances (as opposed to means and needs) changed could the issue of forum non conveniens be relitigated.

b. The Modified Hague Convention Approach

The second option for determination of jurisdiction proposed by this paper is modelled on the Hague Conventions of 1958 and 1973.\(^3\) Under the Convention of 1958 (the Child Support Convention), the jurisdictional criteria for an enforceable order are relatively few in number, but they are listed with more precision than is suggested under the modified common law approach. They are as follows:

1. the authorities of the state in which the requested payor has his habitual residence at the time the cause of action is commenced;
2. the authorities of the state in which the payee of child support has her habitual residence at the time the cause of action is commenced;
3. an authority to which the payor submitted either expressly or impliedly on the merits of the case, and not simply to challenge jurisdiction.\(^3\)

\(^{33}\) Supra notes 16 & 27.

\(^{34}\) Supra note 27, art. 3 [author's translation].
The Hague Convention of 1973 extended to support payable by one adult to another. It provides, as does the 1958 Convention, that a decision from one contracting state shall be recognized and enforced by another contracting state if it was rendered according to the jurisdictional rules of the Convention, and is no longer subject to review in the state of origin. The jurisdictional principles, only slightly revised from the above, are as follows:

1. if either the maintenance debtor or the maintenance creditor had his habitual residence in the State of origin at the time when the proceedings were instituted; or

2. if the maintenance debtor and the maintenance creditor were nationals of the state of origin at the time when the proceedings were instituted; or

   if the defendant had submitted to the jurisdiction of the authority, either expressly or by defending on the merits of the case without objecting to the jurisdiction . . . [or]

3. the maintenance is due by reason of a divorce or a legal separation, or a declaration that a marriage is void or annulled, obtained from an authority of that State recognized as having jurisdiction in that matter, according to the law of the State addressed.35

As noted above, even the Hague Conventions, drawn up to regulate the relations between foreign countries, allow more flexibility than our REMO legislation. The Hague Conventions allow a claimant to initiate an action in her own jurisdiction and to have the resulting order recognized and enforced by another jurisdiction without a review on the merits and without another hearing, provided that the defendant had notice of the initial proceeding. The defendant is allowed to put in an appearance, without prejudice, to challenge jurisdiction. Even default judgments will be recognized and enforced unless the default occurred through no fault of the defendant.36

The approach of the Hague Conventions could be applied in the intra-Canadian context. The jurisdictional rules are simple: residence of the claimant, residence of the defendant, or a jurisdiction in which the defendant was either present or to which he submitted. The latter condition is, of course, already part of REMO, and the second condition usually goes hand-in-hand with the last one. The new aspect, for Canadian provinces, would be the allowance of the assumption of final jurisdiction by the courts of the residence of the claimant, with the judgment not to be open to review by the receiving jurisdiction.

35. Supra note 16, arts. 7 & 8.
36. Ibid., art. 6.
These three conditions would cover most of the circumstances of interprovincial maintenance claims involving either adults or children. The approach can be viewed as imposing a moderate amount of legislative treatment on the subject matter as opposed to the minimal legislative treatment called for in option 1. However, under the modified Hague Convention approach, there might be a few cases that would slip between the cracks. Suppose, for example, that the claimant launched a suit in the province of residence of a child to whom support was owed, where that province was not the state of habitual residence of the claimant herself. In such a case, the forum might be found to have jurisdiction based on a real and substantial connection test (see the discussion of the child-state test, below), but would not have jurisdiction under the statute. The only way to ensure that all cases are caught by the statute is to draft a more comprehensive, but necessarily more complex, list of jurisdictional criteria. This is what the American approach attempts.

c. The American Approach

The third option proposed by this paper is the most comprehensive, but also the most categorical of the three, and hence, a little riskier constitutionally than the other two approaches. It can be considered the maximum legislative treatment. This approach is demonstrated by the recent American uniform legislation, the *Uniform Interstate Family Support Act*\(^{37}\) drafted by the Conference for the Uniformity of State Laws in 1992. *UIFSA* lays out a complete list of circumstances that will ground jurisdiction to the exclusion of all others. This list being exhaustive, there seems to be no room for the doctrine of *forum non conveniens*. Once a state has properly taken jurisdiction, it must hear the case; it cannot decline to do so. Only by agreement of the parties can a case be moved from the state that "owns" it. The resulting judgment will be recognized and enforced in all the other states.

This guiding principle of *UIFSA* is called continuing, exclusive jurisdiction. Only one state will have jurisdiction over one fact scenario out of which a claim for maintenance arises. Once that state is initially determined (this being the threshold issue to the awarding of maintenance), that state maintains jurisdiction until all the parties involved—payor, payee and children, if any—have moved out of the jurisdiction (unless the parties consent otherwise). Only then does the original state lose its continuing, exclusive jurisdiction. Even after a state has lost its

---

continuing exclusive jurisdiction through the application of the above criterion, the original support order issued by that state retains its validity and is enforceable anywhere in the federation until a claim is made to vary it. Then the issue of jurisdiction must be re-determined, and, once decided, a new state assumes continuous, exclusive jurisdiction. The theory behind the jurisdictional principle of UIFSA is that, once the original state has properly assumed jurisdiction, the burden should be on the person moving away to return to the original state to relitigate maintenance issues.

The bases on which jurisdiction must be assumed by a state over a non-resident are as follows:

1. the individual is personally served with [citation, summons, notice] within this State;
2. the individual submits to the jurisdiction of this State by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
3. the individual resided with the child in this State;
4. the individual resided in this State and provided prenatal expenses or support for the child;
5. the child resides in this State as a result of the acts or directives of the individual;
6. the individual engaged in sexual intercourse in this State and the child may have been conceived by that act of intercourse;\(^\text{38}\)
7. the individual asserted parentage in the [putative father registry] maintained in this State by the [appropriate agency]; or
8. there is any other basis consistent with the constitutions of this State and the United States for the exercise of personal jurisdiction.\(^\text{39}\)

The American Uniform Law Commission had examined two other models before arriving at the above text. The first of these was the former American uniform legislation, URESA,\(^\text{40}\) with its multi-tiered system of

\(^{38}\) At the 1992 Annual Meeting a commissioner pointed out that, by limiting the jurisdiction claim to conception via "sexual intercourse", modern scientific methods of conception would not create long-arm jurisdiction. To this criticism, John Sampson, author of the annotations to UIFSA, \textit{ibid.}, states that "the response is that subsection (8) is sufficiently broad to cover all new topics." This, however, is arguable. It could be asserted that the purpose of subsection 8 is to allow for \textit{new}, unforeseen, developments in the common law. \textit{In vitro} and test-tube fertilization clearly are not new, and could easily be drafted into (7), to avoid any inkling that they might have been deliberately excluded.

\(^{39}\) \textit{UIFSA, supra} note 37, s. 201.

\(^{40}\) \textit{Supra} note 2.
support orders.\textsuperscript{41} This was rejected, as the cumbersome process of multiple hearings was the primary reason for reform in the first place.

The second model examined by the Uniform Commissioners was the child-state model. Under this, the state wherein the child resides would be mandated to assert jurisdiction in all child support cases, whether or not the noncustodial parent had contacts with that state. This circumstance is impliedly allowed under the Hague Convention of 1958, assuming that the child lives with the support claimant. However, this approach was reluctantly rejected by the Uniform Commissioners, and was excluded as item 9 in the official text of \textit{UIFSA}. This was because, fourteen years earlier, the U.S. Supreme Court in \textit{Kulko v. Superior Court of California for San Francisco},\textsuperscript{42} had ruled that the wording in a California statute similar to the wording in s. 201(8), above, did \textit{not} allow for the child-state model. In the circumstances before it, the Court held that the child-state model was unconstitutional as it violated due process and basic principles of fairness. In \textit{Kulko} the father, as the custodial parent, was residing in New York with the two children in New York while the mother lived in California. Later the father consented for one child to join her mother. About two years after that, the mother arranged for the other child to join her, this time without the custodial father's consent. The mother then sought a child maintenance order against the father in California, grounding her claim on a California statute which incorporated the language of s. 201(8). The Supreme Court of the United States held that personal jurisdiction could not be obtained over the nonresident husband, stating that to allow such claim would violate due process. Applying a balancing test, the Court found that basic considerations of fairness, coupled with the fact that the father did not receive any benefit for submitting himself to the jurisdiction of California, sustained this view.

It is an open question whether the Supreme Court of Canada would agree with the U.S. Supreme Court in \textit{Kulko}. Our court might well find that the residence of the child, absent any other connection of the respondent to that province, was a real and substantial connection sufficient to ground jurisdiction within the constitutional principles of \textit{Morguard} and \textit{Hunt}. This is especially so because our federation contains both common law and civil law jurisdictions. Therefore when formulat-
ing law and policy our Supreme Court gives more weight to civil law principles and to European precedents than does the American Supreme Court. It might be that a Canadian child-state clause would be upheld, or that a catch-all clause such as 201(8) would be held to allow the child-state principle to operate.

As noted above, the American approach of UIFSA leaves no room for the doctrine of forum non conveniens. Either a state has continuing, exclusive jurisdiction or it does not. "The privilege of declining jurisdiction, thereby creating a vacuum, is not authorized under UIFSA."43 It is possible, however, for a state to transfer the proceedings to another state under the Uniform Transfer of Litigation Act if both states agree that such a transfer is appropriate.44

With regard to modification of an existing order, UIFSA provides that only the original state may entertain an application to vary or dismiss, until such time as the original state loses its continuing, exclusive jurisdiction. This loss of jurisdiction can only happen in two circumstances: upon agreement of all the parties, or when all parties have left the original state. When all parties have left the original state, the original rules for determining jurisdiction do not apply to a redetermination of jurisdiction. Instead, the litigant seeking modification must make application to the state of residence of the respondent to the petition. This so-called cross-over jurisdiction is based on the theory that, when both parties have moved out of the original state,

the burden to litigate at a distance is placed upon the individual who is seeking the modification. In short, there is a perfectly valid order in existence, and the person who seeks to change it bears the burden of litigating at a distance. [Cross-over jurisdiction] attempts to achieve a rough justice between the parties in the majority of cases by preventing a litigant from choosing to seek modification in a local court to the marked disadvantage of the other party. For example, an obligor visiting the children at the residence of the obligee cannot be validly served with citation accompanied by a motion to modify the support order.45

In its final report to Congress in 1992, the Commission on Interstate Child Support stated: "The Commission recommends that Congress

---

43. Sampson, supra note 37 at 164.
44. See ibid. at 120, footnote 64. The Canadian Uniform Law Conference has proposed a transfer of litigation statute (the Uniform Court Jurisdiction and Proceedings Transfer Act, 1994, intended as a companion piece to the Uniform Enforcement of Canadian Judgments Act); however, the Court Jurisdiction and Proceedings Transfer Act, as is apparent from the title, also attempts to deal exhaustively with jurisdictional principles, which may be one of the reasons it has yet to be adopted by any province.
45. Sampson, ibid., at p. 163 of the text and fn. 158. There is generally no appeal of maintenance orders, only modification based on change of circumstances.
require all states to enact UIFSA, effective as of a certain date, as a condition of receiving federal funds." In 1993 the U.S. Congress partially complied with this request, introducing legislation requiring each state to enact UIFSA without material change by 1 January 1996, although no penalties were attached for failure to comply.

2. Choice of Law

After jurisdiction (and forum non conveniens, if applicable) are determined under any of the three options described above, the forum must then decide which law applies to a claim for maintenance. REMO stipulates that the law to be applied in its provisional-confirmation order scheme is that of the residence of the maintenance claimant, at least if that law is pleaded. URESA (the former American interstate enforcement scheme), on the other hand, directed that the law to be applied should be the law of the state wherein the obligation was incurred. This choice of law rule is probably the closest to the approach the common law would take today if left to its own devices. The analogy can be made to tort law, wherein the choice of law within Canada is the lex loci delicti, the law of the place of the tort. This rule found favour with the Supreme Court of Canada in Tolofson because, as La Forest J. pointed out, if a person travels to other parts of the country, he or she should not find it unusual or burdensome to be bound by the laws of these places during the time of the visit.

However, in the United States under URESA, this place of the obligation rule created great confusion and complexity for courts and litigants. As Sopinka J. noted in Amchem, it is sometimes difficult to determine the place in which the obligation was incurred. As a result of the difficulties encountered with the rule, the Commissioners who drafted UIFSA decided that a simpler approach was necessary. UIFSA thus takes the position that the choice of law should always be that of the state that has continuing, exclusive jurisdiction, i.e. the forum. No pleading nor introduction of another law is permitted.

---

47. Supra note 4.
48. See M.C. Haynes, supra note 41 at p. 11; and Sampson & Kurtz, supra note 46 at p. 88, describing the situation as one of "chaos and confusion".
49. Supra note 19 at 911.
Two Hague Conventions on choice of law in maintenance obligation cases, separate from the conventions discussed above, exist.\textsuperscript{50} The 1956 \textit{Convention sur la loi applicable aux obligations alimentaires envers les enfants}\textsuperscript{51} (companion piece to the Hague Convention of 1958 discussed above), takes a different approach to choice of law from the American statute. Article 1 of that instrument declares that the proper law shall be the law of the place of residence of the child claiming support. The 1973 \textit{Convention on the Law Applicable to Maintenance Obligations}\textsuperscript{52} companion piece to the Hague Convention of the same year discussed above, adds to these provisions. It states:

\textbf{Article 4}

The internal law of the habitual residence of the maintenance creditor shall govern the maintenance obligations referred to in Article 1.

In the case of a change in the habitual residence of the creditor, the internal law of the new habitual residence shall apply as from the moment when the change occurs.

\textbf{Article 5}

If the creditor is unable, by virtue of the law referred to in Article 4, to obtain maintenance from the debtor, the law of their common nationality shall apply.

\textbf{Article 6}

If the creditor is unable, by virtue of the laws referred to in Articles 4 and 5, to obtain maintenance from the debtor, the internal law of the authority seized shall apply.

In Canada, the only pertinent question regarding choice of law in interprovincial maintenance cases is whether that choice is constitutionally permissible. In \textit{Tolofson},\textsuperscript{53} La Forest J. reminds us a province will

\textsuperscript{50} \textit{Collection of Conventions}, supra note 18. The U.N. also has such a convention: the \textit{Convention for the Recovery Abroad of Maintenance}, 20 June 1956, 268 U.N.T.S. 3, which predates the 1956 Hague Conventions by a few months. It does not purport to contain jurisdictional rules of private international law. It merely provides a process for the expeditious transmission of documents relating to a claim or order for support. The claim or order must still be processed by the receiving state according to its normal jurisdictional rules of private international law. However, a choice of law rule is provided. Article 6, paragraph 3, provides:

"Notwithstanding anything in this Convention, the law applicable in the determination of all questions arising in any such action or proceedings shall be the law of the State of the respondent, including its private international law."

\textsuperscript{51} \textit{Collection of Conventions}, supra note 16.


\textsuperscript{53} \textit{Supra} note 4.
only be able to impose its law on a cause of action if that cause of action is sufficiently connected with the province to fall under the scope of s. 92 of the Constitution Act, 1867 and its words "within the province." Choice of law has traditionally followed jurisdiction, but, as Tolofson points out, that is not necessarily constitutionally correct when jurisdiction can be taken by a number of different provinces, each of which might have a real and substantial connection with the cause of action.

It seems, therefore, that under the modified common law approach described above, it would be logical to determine choice of law by the modern common law rule, the place wherein the obligation was incurred. This would certainly not be a bad or an incorrect approach; however, the American experience should warn us that it is not always an easy one.

The second option, the modified Hague Convention approach, chooses the law of the place of the support claimant as its choice of law rule. This is simple to ascertain and would, for the most part, be easy to apply, since the law of the place of residence of the claimant would almost always be the law of the forum under the Convention's jurisdictional rules. However, some fact situations can be envisaged in which the constitutional underpinnings of applying this rule to the intra-Canadian context would be suspect. If, for example, a mother in one province were suing a father in another province for support payments for children who lived with their grandparents in a third province, and the support were to be paid directly to the grandparents, the connection between the third province and the forum might be too tenuous to constitutionally sustain the choice of law rule.

Under option three, the American approach, choice of law follows jurisdiction. Because jurisdiction is sufficiently limited so that only one state, province or territory has continuing, exclusive jurisdiction, the choice of law will always be that of the forum. It is arguable that this rule is constitutionally supportable under the principles described above, since any province that takes jurisdiction must have a real and substantial connection to the cause of action. This option is as simple as the Hague Convention choice of law rule, but arguably more likely to withstand constitutional scrutiny.

3. Registration, Enforcement and Waiting Periods

Presently at common law in Canada, in the absence of a registration scheme, a judgment creditor can get his or her judgment enforced in another province only by suing on that judgment. The full faith and credit system as elucidated in Morguard did not change this aspect of the law. Under full faith and credit, the existence of the judgment is itself proof of
its validity, and a case will not have to be re-examined on the merits by
the court from which recognition is requested. The court in the receiving
jurisdiction, after verifying that the original court properly assumed
jurisdiction, issues its own order, and that order is then enforced through
its normal enforcement channels.

Even though obtaining such a second order can be accomplished
through a summary judgment application, the procedure is still cumber-
some. Registration systems were designed to counteract this. Under a
registration scheme, it is no longer necessary to sue on a judgment. REMO
provides such a system of registration, and this aspect of the statute should
be maintained and improved in any new Canadian enforcement of
maintenance orders statute.54 However, challenges to registration under
a new Canadian Act should be severely limited.

Some provision to allow the respondent to challenge the jurisdiction
of the originating court after the fact may be necessary in our federation.
But it is equally arguable that this principle, like other guiding principles
of REMO, is more applicable to the international context than to the
Canadian one. In Canada the argument is stronger that the proper place
for the respondent to argue the jurisdiction of the original court is before
the original court, not before the court of the receiving jurisdiction. If he
does not take advantage of this, he should not be rescued and given
another chance by being allowed to mount a jurisdictional challenge in
the receiving court. It is said that vexatiousness, expense and delay are the
three tools through which the rightful claims of impecunious litigants are
defeated. Nowhere is the risk of this greater than in family law.55

This does not necessarily mean that the courts of one province must
give blind faith and credit to the judgments of another.56 Under an
improved registration system, and with straightforward jurisdictional
rules written into the statute, a determination of whether the original court
had properly assumed jurisdiction could be placed within the authority of
the Clerk or Registrar of the court. Even if the jurisdictional rules of a new
statute are more nebulous, as in the modified common law approach, such

54. The U.S. Commission on child support also recognized the importance of a national
registration system: it recommended to Congress the implementation of such a system, as well
as a national computer network for the location of parents: see Haynes, supra note 41.
55. This, of course, is a problem deeply ingrained in our entire litigation system, and task
forces like Lord Woolf's Civil Justice Committee in England and the Ontario Civil Justice
study are only beginning to scratch the surface of the deep systemic changes that are required
Chancellor on the Civil Justice System in England and Wales (London: HMSO, 1996); and
Ontario Civil Justice Review, Civil Justice Review: Supplemental and Final Report (Toronto:
56. See supra note 16.
Interprovincial Enforcement of Maintenance Orders

a determination need not involve copious litigation. An appeal of the Registrar's decision by leave could be included. After registration of an order under REMO, the statute provides a thirty-day waiting period before enforcement during which the respondent may mount another challenge to the order. This waiting period is one more hurdle for interprovincial support claimants to cross before they can finally realize on their judgments. Such a waiting period should not be necessary under a full faith and credit system. Under these schemes, no final order would be issued unless the respondent had had proper notice, and the issuing court had both properly and appropriately assumed jurisdiction according to the statute, which would accord with new common law and constitutional norms. This assumption of jurisdiction would be verified in a summary manner by the receiving court. With all these safeguards in place, an order should become enforceable from the day it is registered with the registering court.

III. The Australian Approach

The Australian approach provides yet another example of how a federal state can deal with matters of intranational enforcement of maintenance obligations. There, divorce and matrimonial causes are matters of federal responsibility. This has been interpreted as giving power over maintenance and support to the national government. The Commonwealth has taken up this responsibility by the enactment of the Family Law Act 1975, the Child Support (Registration and Collection) Act 1988, and the Child Support (Assessment) Act 1989. In spite of the difference in distribution of powers between Australia and Canada, Australian principles of interstate enforcement are of relevance to the Canadian problem because they provide a model for some of the things that could be done with full cooperation between the provinces and between the provinces and the federal government, especially in the realm of appeal procedures and registration.

The Family Law Act 1975 legislated the creation of a unified family court in the States (leaving the jurisdiction over family matters with the

57. REMO, supra note 6, s. 2(5).
58. Commonwealth of Australia Constitution Act (U.K.), 1900, c. 12, s. 51(xxii).
60. Family Law Act 1975 (Cth).
Supreme Courts in the Territories) and provided for an orderly transition of case-load to the jurisdiction of that court. The Act sets out a choice of law rule, interpretive principles, and provisions for the transfer of proceedings where such transfer is in the interests of justice. Further, the *Family Law Act* mandates cooperation between the different courts in existence at its inception.\(^{63}\) The pertinent parts of the Act are as follows (some subsections not reproduced):

39. (1) Subject to this Part, a person may institute a matrimonial cause under this Act —

(a) in the Family Court; or

(b) in the Supreme Court of a State or Territory. . . .

(5) Subject to this Part, the Supreme Court of each State is invested with federal jurisdiction, and jurisdiction is conferred on the Family Court and on the Supreme Court of each Territory, to hear and determine —

(a) matrimonial causes instituted under this Act; . . .

42 (2) Where it would be in accordance with the common law rules of private international law to apply the laws of any country or place (including a State or Territory), the court shall apply the laws of that country or place. . . .

45 (1) Where it appears to a court in which a matrimonial cause (including a matrimonial cause instituted before the commencement of this Act) is pending that a matrimonial cause (including a matrimonial cause instituted before the commencement of this Act) in respect of the same marriage or void marriage is pending in another court, the first-mentioned court may stay the proceedings in that court for such time as it thinks fit or may dismiss the proceedings.

(2) Where it appears to a court in which a matrimonial cause has been instituted or is being continued under this Act that it is in the interests of justice that the proceedings be dealt with in another court having jurisdiction under this Act, the court may transfer the proceedings to the other court. . . .

47 All courts having jurisdiction under this Act shall severally act in aid of and be auxiliary to each other in all matters under this Act.

The *Child Support (Assessment) Act* 1989 provides a comprehensive scheme for the determination of the amount of liability of a parent to a child. The primary procedure for such determination is administrative, and is engaged either by application for administrative assessment, or by application for acceptance of an agreement for child support.\(^{64}\) Appeals from an administrative assessment can be made to a court having

\(^{63}\) *Family Law Act* 1975 (Cth), s. 47.

\(^{64}\) *Child Support (Assessment) Act* 1989 (Cth), s. 92.
jurisdiction under the Act. Alternately, the courts have jurisdiction to make a determination of support payable. An appeal of an incorrect assessment by a court can be made within the appellate jurisdiction under the Family Court Act, and by special leave to the High Court of Australia. Detailed circumstances under which a court may modify, discharge or suspend an order are listed, with the overriding stipulation that such an alteration must be just and equitable as regards the child, the custodian entitled to child support and the liable parent concerned; and otherwise proper.

The Child Support (Registration and Collection) Act provides a complete scheme for the registration of all Australian maintenance liabilities. The payee of a registrable maintenance liability must, within fourteen days of the order being made, inform the Registrar if she wishes to have the order enforced. The Registrar enters the information into the Child Support Register, and the liability becomes enforceable on the day on which it is registered (with a few specific exceptions).

This registration system provides a model for the Canadian provinces to imitate. If all judgments, whether by application of options 1, 2, or 3, are recognized throughout Canada, an administrative system of registration should be all that is necessary for full implementation of a better system for the enforcement of child support orders.

Conclusion

It is apparent that Canada is lagging behind other federations in dealing with the issue of interjurisdictional support cases. REMO, steeped in nineteenth-century traditions of common law conflict of laws rules and based on a faulty vision of our country, works inconvenience and injustice to many support claimants. We can do better. Perhaps the system we devise cannot be as convenient as that of Australia; that is the price we pay for the nature of our federation. But any one of the models discussed here would be an improvement on REMO. The time has arrived for serious consideration of these models.

68. 1988 (Cth).