CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE
INSTITUT CANADIEN D'ADMINISTRATION DE LA JUSTICE

Second Judicial Conference on Family Law

August, 1985

THE RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS

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THE RECIPROCAL ENFORCEMENT

OF

MAINTENANCE ORDERS

The Common Law

(a) General

The Divorce Act of Canada, and the Reciprocal, Provincial Statutes dealing with the registration and making of final and Provisional Orders, provide a framework mostly unknown to the common law and, created to overcome its hardships.

Under the common law, in order to register an award of maintenance, one has to have a judgment which is final and conclusive, and the Court making the order has to have the jurisdiction to make it.[1]

Maintenance Orders are not considered final. In decisions in 1957 and 1959, Williams, C.J. Q.B.[2] held that maintenance awards made in conjunction with judicial separations and divorce decrees outside of Canada could not be registered in Manitoba since:

(1) they were not final; and

(2) the maintenance portions could not be severed from the status portions of the orders and the Act would not allow part registration of an order.

[1] Nouvion v. Freeman (1889) 15 APP Cas.1

[2] Paslowski v. Paslowski, 11 D.L.R. (2d) 180 and Re: Fleming and Fleming, 19 D.L.R. (2d) 417

(b) In Personam, In Rem

It is also necessary to categorize judgments as being either in personam, in rem or quasi in rem, to assist in determining whether there is jurisdiction in the original Court.

The editors of Stroud's Judicial Dictionary[3] define in personam as:

> "a judgment in personam binds only the parties to the proceedings, as distinguished from one in rem which fixes the status of the matter in litigation once and for all, and concludes all persons:"

The same volume at page 2319 states:

> "a judgment in rem I conceive to be an adjudication pronounced . . . upon the status of some particular subject - matter, by a tribunal having competent authority for that purpose. Such an adjudication (being a most solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared concludes all persons from saying that the status of the thing adjudicated upon was not such as declared by the adjudication".

Professor McLeod states in his book The Conflict of Laws[4]:

> "in certain situations a court, in proceedings brought by one person against another, seeks by its judgment to affect not merely the parties to the action, but the world as a whole. In such cases, the effects of the judgment are intended to be greater than in purely in personam actions, since the judgment is not satisfied out of a res.

[3] Stroud's Judicial Dictionary, 4th ed., page 2016

[4] The Conflict of Laws (The Carswell Company Limited, 1983 at page 60

> Such actions are often referred to as quasi in rem only".

His footnote to that quotation states that divorce and nullity actions are to be considered quasi in rem. Ordinarily the Court's jurisdiction in an in rem action relates to its control over the Res, while its in personam jurisdiction relates to personal control over the parties or submission by the parties to that control.

In Attorney General for Ontario v. Scott[5] it was held (and I quote from the headnote):

> "a province might validly create in favour of a non-resident, a civil right within the province, e.g., a marital right to maintenance, enforceable against those within its territorial jurisdiction. It does not need jurisdiction over a person to give him or her a right in personam. However, it cannot divest a person of a right where it acts on jurisdiction over the debtor only, unless it has jurisdiction over the creditor (which may in itself not always be sufficient) or over the right".

In 1978 the British Columbia Supreme Court[6] (I will refer to the Court of Appeal decision on this shortly) held that petitions for divorce or nullity are actions in rem which change the status of the parties whereas an interim maintenance proceeding is an action in personam. McKenzie, J. then said that an interim maintenance order made in an action for divorce or nullity is not ancilliary to a decree for divorce or nullity but is an independent order thus it does not depend upon the decree for its existence.

[5] 1 D.L.R. (2d) 433, 1956 S.C.R. 137

[6] Gwyn v. Gwyn, 90 D.L.R. (3d) 195

(c) Recognition of Foreign Orders

In this area two problems arise. Professor McLeod states them succinctly[7]:

> "(1) will the support order be enforceable if the foreign divorce or other order is impeachable, or otherwise not recognizable according to the conflict of laws rules of the forum; and
>
> (2) will a support order be enforceable if the foreign court lacked in personam jurisdiction over the debtor spouse".

On the one hand it has been held that if the foreign decree is recognizable in Canada, it is not necessary that the granting court had in personam jurisdiction.[8]

While on the other hand the Ontario Court of Appeal in Ducharme v. Ducharme[9] said that:

> "although an in personam judgment ancilliary to a quasi in rem judgment is dependent on the validity of major relief for prima face validity and effect, the mere fact that the major decree is recognizable does not render the ancilliary order recognizable without in personam jurisdiction over the defendant spouse".

Decrees of divorce or nullity will be recognized by Canadian Courts where the Canadian Court would have assumed jurisdiction if the facts would have given similar jurisdiction to a Canadian Court. The Court of Appeal in British Columbia confirmed this position and added a variation.[10]

[7] supra page 710

[8] Summers and Summers (1958) 13 D.L.R. (2d) 454 (Ont. High Court)

[9] (1963) 39 D.L.R. (2d) 1

[10] Gwyn v. Mellen et al, 101 D.L.R. (3d) 608, see supra footnote p. 3

In that decision an English Court took jurisdiction based on residence which the British Columbia Court would not have done. British Columbia would have taken its jurisdiction based on the place of celebration of the marriage. (Both would give England jurisdiction). An interim order for maintenance based on the nullity action was therefore registerable and enforceable in British Columbia under the Reciprocal Enforcement of Maintenance Orders Legislation with the exchange calculation of the foreign award to be made at the time the foreign Court made the order.

Divorce Act - Registration

Sections 11(2), 14 and 15 of the Divorce Act of Canada are as follows:

> "11(2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them.
>
> 14. A decree of divorce granted under this Act or an order made under section 10 or 11 has legal effect throughout Canada.
>
> 15. An order made under section 10 or 11 by any other superior court in Canada and may be enforced in like manner as an order of that superior court or in such other manner as is provided for by any rules of court or regulations made under section 19".

An award of costs cannot be equated with a lump

sum maintenance award and registered under s.15 of the Divorce Act. Only awards under s.10 and 11 of the Divorce Act may apparently be registered.[11]

In Jeske v. Jeske[12] the Alberta Court of Queen's Bench agreed with the Supreme Court of British Columbia that the Supreme Court of British Columbia had jurisdiction to deal with moveable properties in Alberta, and to apply the Alberta Matrimonial Property Act for the divorce being granted in British Columbia. The wife then applied to register the decree nisi in Alberta which was allowed in part. Registration of that part of the decree containing the lump sum awarded pursuant to the Alberta Matrimonial Property Act could not be registered since that part of the award was not made pursuant to the Divorce Act. In British Columbia the application can be joined to the divorce action which cannot be done in Alberta.

Provincial Acts - Old or New

For the purpose of the discussion, I will refer to the Maintenance Orders Enforcement Act of the province of Nova Scotia (which is a new Uniform Act) and use it as a guide. (A copy is attached as Appendix "B").

Recognizing that the various provinces have different statutes in this area, I contacted a member of our

[11] Williamson v. Williamson, 4 R.F.L. (2d) 375
[12] 50 A.R. 216

Attorney General's Department in Alberta and was advised that on February 21, 1985, at a Federal Provincial meeting on Enforcement of Maintenance and Custody Orders held in Toronto, all the Provincial and territory Acts were considered. I was further advised that:

(a) British Columbia has the old Act but is doing amendments to the Family Relations Act and adopting new Act provisions therein;

(b) Alberta indicated that the Uniform Act would be in force in Alberta on March 1st (which it is);

(c) Saskatchewan indicated that they had the new Uniform Act in effect;

(d) Manitoba has the new Uniform Act;

(e) Ontario agreed that they have a working model of the Act in force;

(f) Quebec indicated that they had the old style Act in effect but were actively considering bringing in the new legislation perhaps in the late fall;

(g) New Brunswick indicated that they had the old Act, not the new Uniform Act;

(h) Nova Scotia has the new Act;

(i) Prince Edward Island has the new Act but no provincial Court involvement;

(j) Newfoundland still had the old style legislation but is looking at the new Uniform Act;

(k) the Yukon and Northwest Territories have the old Act.

R.E.M.O.

(a) Final Orders

As in many provinces then, you will note that under the Nova Scotia Act dealing with final orders, [(s.3(1) of the Nova Scotia Act - as in the other model Acts - coupled

with s.2(f) and 2(h) make a maintenance order a final order to get over the common law difficulty] the Attorney General must receive a certified copy along with information that the respondent is in Nova Scotia. He then designates a Court in the province for the purpose of registration and forwards the order and supporting materials to the Court. A proper officer of the Court shall file the order with the Court and give notice to the respondent.

(b) Provisional Orders and Defences

Provisional orders are sent by a proper officer of the Court to the Attorney General along with certain documentation. Section 7(5) is a statement that where the reciprocating state requires, the Attorney General of Nova Scotia shall forward as well a statement of grounds on which the making of the confirmation order might have been opposed if the respondent were served with the process and had appeared in the province of Nova Scotia.

Again please notice s.3(7) which provides that an order purporting to be a final order but determined not to be by the Court may automatically be treated as a Provisional Order and that s.7 no longer provides that statements of defences available are final and conclusive.

For those provinces without a s.7, Miller v. Graves[13] is authority for the proposition that the only defences available to the respondent are those which would have been available in the forum of the Court which made the order.

Section 8 of the R.E.M.O. Act provides that a provincially appointed judge may not vary a registered order made by a federally appointed judge, they may, however make a provisional order for variation of an order of a federally appointed judge based on provincial legislation.

Nature of R.E.M.O.

(a) Legislation

The Reciprocal Statutes provide for the registration of both final and provisional orders and their variation.

Initially the constitutional validity of the Ontario Act was questioned in the Supreme Court of Canada in the John Louis Scott case.[14] The contention was that the Act was ultra vires because the legislature had in effect delegated its legislative authority to another province.

[13](1983) 45 A.R. 232, 146 D.L.R. (3d) 182, see also Thompsett v. McKenzie [1982] 3 W.W.R. 333, 18 Alta. L.R. (2d) 335 and the annotation by James J. McLeod found in 27 R.F.L. (2d) 251

[14]1965 S.C.R. 137

The Court held that the reciprocal statute was not a treaty, since there was nothing binding between the parties to it. They said it was a clear case of adoption and not a delegation, with the action of each legislature distinct and independent of the other. Locke, J. in an often quoted statement said at page 442:

> "the use of the word 'confirmed', both in the English and Ontario statutes, seems to be unfortunate. To speak of confirming an order which of itself has no binding effect seems to me to be a misuse of language and it is, indeed in my opinion, the use of this expression which has invited the attack upon the legislation . . . the language employed in subsections (3) of section 5 again suggests that some legal effect is given to the order made in England, but this clearly cannot be so. The order made must derive its legal force and effect entirely from the applicable Ontario statute".

It has further been held in the British Columbia Supreme Court[15] that under the British Columbia Family Relations Act of 1972 (c.20 1972 Acts of British Columbia) it was not necessary that the applicant reside in a reciprocating state but only necessary that she commence her action in a reciprocating state.

In Bazylo v. Collins; Procureur General de Quebec[16] the Quebec Court of Appeal held that Quebec legislation designed

[15] Brown and Croll, 36 D.L.R. 639

[16] 26 A.C.W.S. (2d) 372

to secure the carrying out of an intent between France and Quebec and to promote reciprocal assistance in administration of justice including child custody and alimony was, valid provincial legislation. Either party to the arrangement could repeal its respective legislation at will.

Not surprisingly where a right of appeal exists under the Reciprocal Enforcement of Maintenance Orders Act in the respective provinces, a perogative writ does not lie[17].

(b) Proceedings

It may be worth discussing the nature of the enforcement procedure under the Reciprocal Enforcement Act in light of the decision, Re: Attorney General for Ontario and Rae[18] wherein the Ontario High Court of Justice held that the procedure for enforcement:

> "is analogous to the judgment summons procedure in the Small Claims Courts and their predecessors, the division courts. First and foremost it is inquisitorial and not adversarial, and proceedings after judgment in aid thereof, is not one leading to judgment".

With regard to the Charter, the Rae decision also held that while a person might go to gaol on default in an enforcement proceeding, they were not persons charged with an offence under s.11.

[17] R. v. Alder (1968) 67 D.L.R. (2d) 513 B.C. S.C.

[18] 4 D.L.R. 4th, 465

I recognize that this view of the nature of the proceedings may be the reality in much of the country, but would argue that it should not be. Does this position, for example, accord with s.12(1) of the Reciprocal Enforcement of Maintenance Orders Act which directs the Attorney General to take all reasonable methods to enforce? Where a person, although not charged with an offence can suffer a loss of freedom, perhaps the judge should not be the inquisitor.

In Sherman v. Sherman[19] Nasmith Prov. Court J. held that the role of a judge in a confirmation hearing in the applicant's absence, is to remain impartial in dealing with the preliminary jurisdiction issues. It is better for the Ministry to make an agent available to make submissions for the applicant.

The burden is upon the respondent to satisfy the Court that the provisional order should not be confirmed.[20]

[19] 24 A.C.W.S. (2d) 40, February 13, 1984

[20] Labreque v. Labreque (1981) Sask. D. 1617-0. D.C. No.638/80 Battleford, April 22, 1981, Wimmer, D.C.J.

Jurisdiction of the Original Court

(a) General

In Bailey v. Bailey[21] a family court judge in Manitoba refused to confirm a provisional order of the Ontario Provincial Court, on the ground that Ontario had no jurisdiction to make the order when the matrimonial disputes upon which it was based took place outside of Ontario.

The Supreme Court of Canada held that it was clearly within the jurisdiction of an Ontario Court to make the provisional order complained of, which was not final or binding and which could have been opposed by the respondent in the Manitoba court on any ground which would have been open to him in Ontario. To hold that a provisional order could only be made by a Court having jurisdiction to make a final order would be to defeat the whole purpose of that part of the legislative scheme.

In Wegner (Graves) against Fenn[22] the British Columbia County Court on appeal from the Provincial Court declared a final filiation order from Saskatchewan a nullity, since neither the transcript of the Saskatchewan judge's notes nor his formal endorsement of the disposition of the case

[21] (1968) 64 W.W.R. 502
[22] (1970) 71 W.W.R. 76

contained any indication whether the Court had evidence of the ability and prospective means of the father and the mother to pay. Since the Saskatchewan Act required those matters to be taken into consideration, the British Columbia Court held that since jurisdiction of an inferior Court must be made apparent, and could not be presumed, the trial judge in British Columbia should have considered the lack of jurisdiction before proceeding.

The Unified Family Court at Saskatoon in Houde v. Critten[23] was asked to confirm a provisional order from the Manitoba Provincial Court. The defence was that the Manitoba Court had no jurisdiction to make the order because the mother was not married to the respondent. Counsel contended no jurisdiction since the Family Maintenance Act of Manitoba applied only to children of married persons. The Saskatchewan Court held that counsel had misconceived the defence of no jurisdiction, saying lack of jurisdiction to make an order signified a lack of power to do so. The Court made the distinction between the Manitoba Court having the power to make the order and a mistake in the use of that power. It confirmed the provisional order.

[23] (1982) Sask. D. 1622-04 - I question this. It is Sask. which is making the order and determining the rights and liabilities of the parties based on Manitoba and Sask. law. If an error is perceived perhaps confirmation need not be given.

In Skakun v. Skakun[24] the Saskatchewan District Court held that where a provisional maintenance order was made in British Columbia against a husband residing in Saskatchewan and the wife later resumed cohabitation with her husband in Saskatchewan, jurisdiction existed in the Saskatchewan Court. The Court went on then to confirm the order. The report does not indicate whether the wife had gone back to British Columbia, if she had not it would seem unusual to proceed with the reciprocal legislation when both parties were in Court in Saskatchewan.

In Vanderauwere v. Nesbitt[25] the Saskatchewan Unified Court granted a provisional order of maintenance to a mother against a father residing in British Columbia. The father in British Columbia said the Saskatchewan Unified Family Court had no jurisdiction because the claim for maintenance by the mother was required to be brought under the Children of Unmarried Parents Act and not the Infants Act under which the Court had acted. The British Columbia Provincial Court remitted the matter back to Saskatchewan for further evidence from the mother. The Saskatchewan Court held that it had

[24](1976) 6 W.W.R. 283
[25](1984) 28 Sask. R. 299

jurisdiction to hear the unwed mother's application for maintenance under the Infants Act as well as under the Children of Unmarried Parents Act and presumably forwarded the matter back to British Columbia for confirmation. Presumably British Columbia, while loath to do so, could disagree if this was not the case.

In Hastie v. Battye[26] the British Columbia Provincial Court held that where on its face it appeared the Ontario Provincial Court had both acted on the wrong statute and not forwarded a statement of grounds the provisional order could not be registered in British Columbia.

(b) The Necessity of Inquiry

The Ontario Court of Appeal in 1951[27] stated that it is the duty of the enforcing Court to ensure that the Court issuing the judgment had the jurisdiction to so issue. It further said that there is no jurisdiction in a Provincial Court to make an enforceable order against a person in another province who does not appear or otherwise submit to its jurisdiction.

[26](1983) B.C.D. Civ. 1521-03
[27]Kenny [1951] 2 D.L.R. 98

Attornment

There are a number of decisions where attornment has taken place to give jurisdiction to make the final order rather than a provisional one.[28]

In Attorney General of British Columbia v. Buschkewitz[29] there was a total lack of jurisdiction found in British Columbia to enforce a final German order made in the absence of the appearance of the respondent. He did not appear or in any way attorn to the jurisdiction of the German Court.

In Herzberg v. Manitoba et al[30] a west German Court ordered that the respondent was the father of a child in Germany. However, the respondent had attorned to the jurisdiction of the west German Court by asking his uncle to appear for him to deny paternity. The order for maintenance was therefore valid. A second order made later without notice was not registerable. A third order merely quantifying the first was valid and was registerable in Manitoba.

[28] Attorney General of British Columbia and Becker et al 87 D.L.R. (3d) 536 B.C.S.C. 1978, Herzberg v. Manitoba Government and German Institute for Guardianship, 27 Man. R. (2d) 262 Manitoba Court of Queen's Bench, 1984.

[29] (1971) 3 W.W.R 17

[30] (1984) 3 W.W.R. 737

Procedural Qualifications for Registration

(a) Divorce Act

Both in the filing of orders under s.15 of the Divorce Act and the making of orders under the various reciprocal Acts, procedural requirements must be checked by the registering Courts. (Refer also to "Divorce Act - Registration" on p.5).

To register a decree nisi for enforcement in the Provincial Court the question arises as to whether it must go under the Divorce Act (s.15) for registration in a superior court first, or whether it may go directly to a provincial enforcing Court from the Attorney General. While the problem is raised here reference should be made to the heading of Paramountcy where the cases show not only divergence but some provinces question the right to even register in the Provincial Courts at all.

In Bickerton v. Bickerton[31] the New Brunswick Court considered registering an order of interim maintenance granted in Manitoba under the Divorce Act where the wife had not been a resident in Manitoba for a year, the attempt to register in New Brunswick was met with the following comment:

> "s.10 of the Divorce Act clearly stipulates that the court making an interim order pursuant to s.10 must have jurisdiction to grant relief in respect of the petition for divorce and s.5 of the act sets out the jurisdictional requirements: it is obvious that . . . the jurisdictional requirements . . . were not present . . .".

[31] 31 R.F.L. (2d) 323

(b) Provincial Acts

In administering the Provincial Acts the Provincial Courts have refused registration on a number of grounds. Nova Scotia, for example, refused registration on the basis that an Alberta paternity agreement with an attached affidavit was not an order.[32]

A certificate of certification signed by a Justice of the Peace was held not to comply with the Reciprocal Enforcement of Maintenance Orders Act of New Brunswick.[33]

The Ontario Provincial Court held that the Court had no jurisdiction to enforce a foreign decree nisi without evidence that the proper officer of the foreign state transmitted the documents to the Attorney General as required. The Court also held that the nisi could not be sent directly to the Court from out of province for enforcement.[34]

In Nagel and Nagel[35] the Court held that a foreign decree of divorce granted in Ohio (prior to reciprocity with Ontario) with the father now in Ontario and the mother in Michigan could be registered by the Michigan authorities (who

[32] Cockerill v. LeBlanc 25 A.C.W.S. (2d) 107
[33] P.N.D. 19 A.C.W.S. (2d) 313
[34] Ettershank and Owen, 8 A.C.W.S. (2d) 170
[35] 8 A.C.W.S. (2d) 245, Ont. Prov. Ct.

had reciprocity with Ontario) by forwarding to the Attorney General in Ontario. This proceeding was merely an irregularity. It was not necessary to have the Attorney General file the matter in the Superior Court first.

In Villeneuve and Villeneuve[36] it was held that a decree of divorce granted in Quebec but sought to be enforced from Nova Scotia also need not be registered in the Supreme Court of Ontario first, but here, it was not registered because a certified copy of the nisi was not sent by an officer of the Quebec Court to the Ontario Attorney General. (It came from Nova Scotia).

On the other hand, in 1980 the Provincial Court of Ontario also held that a decree nisi of divorce could not be registered with it under the Reciprocal Enforcement of Maintenances Orders Act because the Nova Scotia nisi was never registered in the Supreme Court of Ontario as contemplated by the Divorce Act.[37]

In Allen and Allen[38] the Ontario Provincial Court held that a wife who had assigned her support payments to The Friend of the Court in Michigan was no longer a creditor and therefore could obtain no status in an Ontario Court.

[36](1977) 15 O.R. (2d) 341 Ont. Prov. Ct.

[37]Dorrington v. Dorrington (1980) 31 O.R. 29

[38]24 A.C.W.S. (2d) 366

The Alberta Provincial Court has held that where the provisional order failed to prove the respondent resident in Alberta confirmation might also be refused.[39]

Paramountcy

(a) General

Within the field of our discussion on reciprocal matters I propose to discuss this doctrine with relationship to registered divorce decrees precluding provincial reciprocal enforcement of maintenance orders enforcement. Does, for example, the existence of a petition of divorce preclude the making of a provisional order for maintenance? Does the existence of a decree nisi (which is silent as to maintenance) preclude the making of a provisional order? Does the Divorce Act occupy the field of enforcement?

> "The doctrine of paramountcy applies where there is a federal law and a provincial law which are (1) each valid, and (2) inconsistent . . .
>
> Does the 'matter' (or pith and substance) of the law come within the 'class of subject' (or head of power) allocated to the enacting parliament or legislature? If one law fails this test, then the problem is resolved without recourse to the doctrine of paramountcy. It is only if each law independently passes the test of validity that it is necessary to determine whether the laws are inconsistent. This may appear to be labouring the obvious, but there are a startling number of judicial opinions which confuse the issue of consistency with the antecedent, and entirely different, issue of validity".[40]

[39] MacInnis v. Shea, 16 R.F.L. (2d) 94

[40] Hogg - Constitutional Law of Canada 1977, The Carswell Company Limited, Toronto, Canada

In Hamilton Harbour Commissioners v. City of Hamilton et al[41] the Ontario Court of Appeal held that there was no conflict between the parties, since the Commissioners could validly pass bylaws to regulate and control the use and development of land within the harbour for purposes relating to navigation and shipping, and the city might validly pass by-laws affecting land use within the harbour so long as it did not explicitly attempt to prohibit or regulate the use of land for purposes relating to navigation and shipping. The Court recognized an "overlapping" or "concurrent" concept of fields of jurisdiction.

It is only where compliance with one law involves breaching the other that the dominion power prevails. In Construction Montcalm Inc. v. Min. Wage Com.[42] Beetz, J. said:

> "it argues in its factum that the Federal Act provides not only for wages but also for overtime, unfairly labout practices, etc., and that, in several instances, such provisions 'may' differ from those of provincial law. This is not good enough. Montcalm had to prove that Federal and Provincial law were in actual conflict for the purpose of this case. It did not so prove".

[41] 91 D.L.R. (3d) 353, 21 O.R. (2d) 459
[42] [1979] 1 S.C.R. 780

(b) Occupation of the Field of Enforcement by the Divorce Act - Does the Divorce Act Foreclose Provincial Enforcement?

In 1967[43] the Alberta Court of Appeal (prior to the Divorce Act which became effective July 2, 1968) decided that the Provincial Court of Alberta could enforce the maintenance provisions of a decree nisi of divorce from Ontario notwithstanding that the Family Court could not itself have made such an order originally. It also held that Ontario was a reciprocating state.

In Broatch v. Broatch[44] in the Supreme Court of British Columbia it was held that a maintenance order ancilliary to a decree of judicial separation made by the Supreme Court of Alberta registered in British Columbia could be enforced by the Family Court of British Columbia. It was recognized that the legislation in British Columbia did not confer jurisdiction on the judges of the Family Court to enforce maintenance orders made ancilliary to matrimonial decrees made in British Columbia but that there was jurisdiction in the Family Court to enforce maintenance orders ancilliary to matrimonial decrees made by the Courts in reciprocating states.

[43] Strauch v. Strauch, 60 D.L.R. (2d) 538

[44] (1968), February, 63 W.W.R. 467

The first Canadian Appeal Court to face the issue after the Divorce Act, was Saskatchewan with Gould v. Gould[45] wherein Woods, J.A. said at page 271:

> "the provision for registration in the province is necessary in order to proceed to enforcement but the proceedings and the authority for them is the Federal authority and not that of the province. Under the doctrine of paramountcy the Provincial legislation would appear to be inoperative as both statutes set out to make and enforce orders of maintenance. There would seem to be direct conflict here".

At page 273 Brownridge, J.A. said:

> "in my respectful opinion the effect of this rule [Rule 621(1) of the Queen's Bench Rules] is to make it the only means of registration pursuant to section 15 of the Divorce Act".

Bayda, J.A. also agreed that the Court of Queen's Bench was the only Bench able to enforce but relied on the fact that R.E.M.O. legislation required that the original order be made by a "reciprocating state". Because of the unifying effect of the Divorce Act, divorce was Canada wide and therefore Ontario was not a reciprocating state.

On June 24, 1981 the judgment in Brewer v. Brewer[46] was given by the New Brunswick Court of Appeal.

Brewer held that where a Superior Court judge awards maintenance under the Divorce Act as part of its Federal

[45] [1980] 1 W.W.R. 1, 19 R.F.L. (2d) 267, July 29, 1980

[46] (1982) 125 D.L.R. (3d) 183, (1981) 35 N.B.R. (2d) 329

jurisdiction, the judgment should be considered one of a "reciprocating state" pursuant to the R.E.M.O. legislation, that the R.E.M.O. legislation does not conflict or contravene provisions of the Divorce Act nor is it in any way affected by it, and that the enforcement procedures provided for by the Divorce Act (s.15) were not meant to be exclusive and thus alternative proceedings as provided by the R.E.M.O. legislation were valid.

Because of a special provision in the New Brunswick divorce rules permitting the enforcement of arrears for only twelve months without special leave and since the R.E.M.O. legislation had no such provision, a R.E.M.O. enforcement could collect more money than an enforcement under the divorce rule. The R.E.M.O. legislation therefore had to give way for payments in excess of twelve months.

On August 27, 1981 the Newfoundland Court of Appeal in Murphy and Murphy; Attorney-General of Newfoundland, intervenor[47] also had to face this issue. It appears that Gould and Murphy were not referred to the Court since they were not mentioned. The Court held that the reciprocal legislation was not open for use to the Newfoundland

47
127 D.L.R. (3d) 473

Unified Family Court for the enforcement of a maintenance order ancilliary to a divorce decree from another province. They stated that since divorce jurisdiction is vested exclusively in Superior Courts and s.15 of the Divorce Act provides for registration, that that is the only means of proceeding. The Unified Family Court could have enforced the order once it had been registered in the Supreme Court of Newfoundland since it was a division of the Supreme Court of Newfoundland. It simply could not use the provisions of the Maintenance Orders (Enforcement) Act of Newfoundland.

Following Murphy came the Ontario Provincial Court decision in Haight and Haight.[48] The application was for enforcement by the Family Division of a maintenance provision ancilliary to a divorce granted in 1968 by the Supreme Court of British Columbia. The Court stated that there was not repugnancy between the Federal and Provincial legislation, that the Provincial Reciprocal Enforcement of Maintenance Orders Act was supplementary to the Divorce Act and not inoperative.

Again in Ontario on October 7, 1981 Flanigan Co. Ct. J. held[49] that provincial superior Courts applying

[48] 10 A.C.W.S. (2d) 160 on August 14, 1981

[49] James and Lockhart, 11 A.C.W.S. (2d) 266

the Divorce Act did not cease to be Provincial Courts. The Court in Quebec was therefore a reciprocating state and since the legislation was not inconsistent with Federal legislation the provinces could enforce the orders under the Reciprocal Enforcement of Maintenance Orders Act.[50]

The next decision was that of the Manitoba Court of Appeal in Rubinstein v. Rubinstein.[51] The Court was emphatic that for the purposes of enforcement of a maintenance order made under the Federal Divorce Act, the Ontario Court was not a National Court but the Court of a reciprocating state. Section 15 of the Divorce Act does not provide an exclusive enforcement procedure; as there is no conflict between the procedures under the Queen's Bench Rules and the Reciprocal Enforcement of Maintenance Orders Act. Both methods of enforcement could co-exist. Huband, J. said at page 357:

> "section 15 of the Divorce Act was not intended to provide the exclusive enforcement procedure. Section 15 says that a Maintenance Order 'may' be registered 'and may be enforced' but the wording leaves open the possibility of other alternative enforcement procedures".

The last Provincial Court of Appeal to so far deal with a matter is that of Alberta. In Pointmeir v. Pointmeir[52]

[50] see also Katz v. Kaye (1972) 27 D.L.R. (3d), 33 (Ont. C.A.) where it was held that registration with the Supreme Court of Ontario of a final decree from Michigan is not precluded by s.2(3) of the R.E.M.O. Act. The registration under the R.E.M.O. Act is only one method of enforcement and not the only one.

[51] [1982] 1 W.W.R. 352

[52] 26 R.F.L. (2d) 384, 37 A.R. 5

Stevenson, J.A. held on behalf of the Court that a wife with an Ontario nisi could register with the Provincial Court under the reciprocal legislation. He held that there was no conflict - and said at page 388:

> "the appellant's argument would deny a litigant the right to charge or seize land under statute . . . would . . . preclude the registration of Alberta decrees in the Alberta Provincial Court".

And again at page 388:

> "the Supreme Court of Canada has restricted the doctrine of occupied field, at least when parliament's ancilliary powers are involved to situations where there is a conflict".

(c) The Effect of Federal Proceedings on Provincial Orders (Provisional or Final) .

The filing of a petition does not in some provinces preclude the subsequent commencement of proceedings in Provincial Court although it is discretionary.[53]

Generally speaking, divorcing Courts do not have the authority to change the arrears under a Provincial Court Order.[54]

[53] Tuz and Tuz (1975) 67 D.L.R. (3d) 41, 25 R.F.L. 87 (Ont. C.A.), Hennessey v. Hennessey (1976) 3 R.F.L. (2d) 140, Ont. Prov. Ct.)

[54] Dair v. Dair (1972) 8 R.F.L. 330 (Ont. C.A.), Nelson v. Nelson (1972) 31 D.L.R. (3d) 584 (Fed. Ct.), Rosychuk v. Rosychuk [1983] 3 W.W.R. 701, 33 R.F.L. (2d) 199 (Alta. Q.B.), Gloin and Gloin (1978) 1 A.C.W.S. 560 (1978) 12 A.R. 584, Sawyers v. Sawyers (1981) 2 W.W.R. 523 Man. C.A.

(d) Effect of Silent Decrees Nisi on Provincial Court

Where the decree nisi is silent, obviously the status of the parties has been affected, the field occupied, and no Maintenance Order could be made by a Provincial Court for a spouse. The question is whether an order still may be made in any individual province for the maintenance of the children.

Chronologically I commence with Black v. Black[55] in the New Brunswick Queen's Bench.

This was an application for enforcement of an Order for Maintenance made in Ontario under provincial legislation varied from time to time under reciprocal legislation in New Brunswick. A decree nisi asking for maintenance for the children was granted to the wife December 22, 1971. The nisi was silent as to maintenance for the children. The Court held that it was logical to conclude that either the application for maintenance was considered and refused or the claim was abandoned. In either event, the divorce decree took precedence over the order made earlier in the Family Division.

In September 1977 in British Columbia[56] the

[55] (1977) 20 N.B.R. (2d) 533, New Brunswick Q.B.

[56] Mudhar v. Mudhar A.C.W.S. 2(1977) 844

British Columbia Supreme Court took the opposite view and said that it was appropriate to make no order on a divorce application to allow a provincial order to continue in force. The Court followed the decision of Hughes v. Hughes[57] which held that until such time as an actual order is made for maintenance by the Superior Court the Provincial Court Order survives and that it is appropriate in the proper course for the Superior Court to be silent to allow for the continuation of the Provincial Court Order.

It is possible that the Alberta Court of Appeal in Goldstein v. Goldstein[58] and McCutcheon v. McCutcheon[59] intended their comments to exclude provincial court jurisdiction after a silent decree nisi, however Redlon v. Redlon[60] and MacDonald v. MacDonald[61] have distinguished both to leave open the possibility that in Alberta the provincial court is not excluded until there is an actual pronouncement.

In the Manitoba's Queen's Bench in 1977[62] a Provisional Order from British Columbia was sought to be confirmed.

[57] (1976) 72 D.L.R. 577 B.C. C.A.

[58] (1976) 4 W.W.R. 646, 23 R.F.L. 206

[59] (1977) 2 Alta. L.R. (2d) 121

[60] (1980) 5 W.W.R. 22 Alta. Prov. Ct.

[61] (unreported Action No.4801-42247 February 28, 1985, Calgary, Alta. Q.B.)

[62] Nykokul v. Nykokul (1977) 3 W.W.R. 473

It was held that the effect of the silent decree nisi was that the maintenance application was refused in the divorce proceeding, and the field occupied.

In 1978 the Saskatchewan District Court[63] held that a silent decree did not preclude the Provincial Court in British Columbia from making a Provisional Order forwarding it to Saskatchewan and registering it for confirmation.

In April 1979 the Prince Edward Island Supreme Court held that a subsequent divorce terminated the original maintenance order (from the Provincial Court of Ontario) and forbade its variation of further proceedings upon it in Prince Edward Island.[64]

In 1983 a British Columbia Provisional Order for Maintenance went for registration to Alberta several years after a divorce decree (silent as to maintenance) was granted in Alberta. It was held that the divorce decree did not cancel the British Columbia right to make the order and to have it confirmed in Alberta.[65]

[63] Yearly v. Yearly (1978) 5 R.F.L. (2d) 301

[64] Carson v. Carson C.C.H. D.R.S. 1980 P.22-528

[65] Miller v. Graves (1983) 45 A.R. 232, 146 D.L.R. (3d) 182 (Alta. Q.B.) see also footnote #11

(e) Effect on Federal Court

Notice that it is s.11(2) of the Divorce Act which gives the right to vary "an order made pursuant to this section". Where the decree nisi was silent as to maintenance Clements, J.S.C. in Southgate v. Southgate[66] awarded interim maintenance pursuant to s.11(1) and not 11(2). The Court held there was even jurisdiction to grant an interim, interim award.

Variation or Amendment

The discussion in this section commences with Meek v. Enright[67] in the British Columbia Court of Appeal.

Bull, J.A. said:

> "whether the judgment should be varied, changed, revoked, or enforcement refused or delayed, should be for the Court of original jurisdiction".

In Ruttan and Ruttan[68] McIntyre, J. quoted Bull, J.A. with approval and said:

> "the law so stated as applicable to the fact of this case and in my view is decisive. If the Provincial Court Judge had entertained the question of whether or not the child remained the child of the marriage she would have gone beyond enforcement proceedings and entrenched upon the jurisdiction of the Court which made the order".

[66] 41 R.F.L. (2d) 246, Ont. Supreme Court [High Court of Justice]
[67] 5 B.C.L.R. 11, 81 D.L.R. (3d) 108
[68] [1982] 1 S.C.R. 690

The Acts of those provinces with the new model Act contains provision for variation[69] however, a provincially appointed judge may not vary or rescind a registered order of a federally appointed judge, except where based on provincial legislation and the order is provisional. Where both parties accept the jurisdiction of the Court, variations of orders based on Provincial legislation may be made, and provisional variations are also provided for where one party is in a reciprocating province.

The New Brunswick Court of Appeal in Cross v. Tytler[70] followed Ruttan fully on a custody order and held that only a Court making a custody order could vary it.

In April 1982 the Manitoba Court of Queen's Bench held that once a certified copy of a foreign divorce decree from outside Canada, containing a maintenance provision, was registered in Manitoba, the Court could only quash the order where it was "conspicuously warranted" such as in cases of demonstrated fraud or where there was a clear violation of public policy.[71]

[69](see s.8 of the Nova Scotia Act)

[70]36 R.F.L. (2d) 67

[71]Holke v. Holke and the Government of Manitoba (1982), 16 Man. R.47

The Saskatchewan Court of Appeal was a bit more liberal and held that where an award of maintenance is being made by a reciprocating state other than a Canadian province or territory Ruttan may be distinguished and the incoming order registered and varied.[73]

In February 1983, the Saskatchewan Unified Family Court allowed registration of a nisi from out of province but within Canada, under the Reciprocal Enforcement of Judgments Act which in Saskatchewan allowed for the variation which was granted. Both parties now lived in Saskatchewan.[72]

I raise three possible problems here:

(1) a provincial statute authorizing variation of a Federal Decree Nisi by a judge at any level;

(2) variation of a Nisi by anyone other than the "court that made the order" (Ruttan v. Ruttan - footnote 68); and

(3) unless the provincial legislation makes a Maintenance Order a final order, it cannot be registered under the common law (supra footnote 2).

In Pinnow and Pinnow[74] it was held that a confirmed Provisional British Columbia order registered in Saskatchewan could be varied by reason of the provisions of the Saskatchewan Reciprocal Enforcement of Maintenance Orders Act. This case

[72] Nunan v. Nunan (1983) 3 W.W.R. 562

[73] Hudson and County of Santa Clara State of California, 146 D.L.R. (3d) 155, 22 Sask. R. 190 Sask. C.A.

[74] (1984) 2 W.W.R. 120, Sask. Q.B. (Judgment October 31, 1983)

was decided on old reciprocal enforcement of maintenance orders legislation. Current Saskatchewan legislation requires the parties to consent to the jurisdiction before there may be amendment.[75]

In Taylor and Taylor[76] Lutz, J. held that a final order could not be varied by an Alberta Court but only enforced. This was also before Alberta passed the new Act, allowing for provisional variation.

In 1984 the Nova Scotia Provincial Court defined children of a marriage under the Divorce Act but did not appear to have had Ruttan[77] referred to it.[78]

Where a final Virginia divorce decree including maintenance was erroneously treated in Saskatchewan by the Court of Queen's Bench as a provisional order and varied, another judge of the same Court would not later challenge the varied order when the route of appeal had not been taken on the first occasion. It was stated that you could not challenge the proceedings in this way collaterally.[79]

[75](a similar section as s.8(4) in Nova Scotia)
[76]Alta. Q.B. (1984) 42 R.F.L. (2d) 450
[77]supra footnote 68
[78]Leviston v. Leviston (1984) 42 R.F.L. (2d) 371
[79]Konway v. Khali, 38 R.F.L. (2d) 97

James G. McLeod in an annotation following the report said:

> "can an order, made without jurisdiction be attacked in collateral proceedings? If the order is void without further action, according to the lex fori, the answer presumably must be yes. If it is not void, without further action, the answer should be no. The fact that an appeal had passed should not affect the issue. The judge does not have unlimited jurisdiction. He only has such jurisdiction as is vested in him by the establishing legislation, or a particular statute. Where he acts outside the scope of either of these perimeters, his order should, presumably, be regarded as void".

He goes on to point out that the judgment is defensible if the first decision was in error in law and not mistaken as to jurisdiction. There was no jurisdiction under the Reciprocal Enforcement of Maintenance Orders Act to register, however there was jurisdiction at common law if it was a final order. The decision as to whether it was a final order or not was if in error not attackable by collateral proceedings.

In February 1984 the Manitoba Court of Queen's Bench held that a final Alberta order registered in Manitoba Provincial Court could be varied by the Manitoba Court of Queen's Bench where both parties resided in Manitoba and had filed affidavits.[80]

[80] Swain v. Gibbs, 28 Manitoba Reports (2d) 119

Discretion to Enforce

The Alberta Court of Appeal in Hinkley v. Hinkley[81] held that there is a different issue arising on a motion to enforce as opposed to a motion for the modification of a final order which has been registered. Kerans, J.A. said at page 347:

> "I emphasize however, the scope of the rule in Ruttan. As does this case, it involves a motion to vary. A different issue arises in a motion to enforce. An enforcing court must have some discretion, or one who fails to pay only because of some recent and faultless impoverishment will go to gaol. I will leave consideration of the limits of that discretion to a case where it is required".

He also quotes Professor Swan[82] at page 887:

> "the enforcing court is not going to be ruthless to someone who is compelled to pay more than he can reasonably afford".

In Ridding v. Morrison[83] the Ontario Provincial Court held that unless the order registered for enforcement was clear and unambiguous, the Ruttan principle applied. As soon as there was a question raised in the enforcing court which may have more than one possible answer then it is not appropriate for the enforcing Court to become involved.

Judge A. Peter Nasmith of the Family Division of the Ontario Provincial Court in a paper given to the annual

[81] 52 A.R. 80, 38 R.F.L. (2d) 337
[82] Canadian Family Law V.2 (1972) D. Mendes De Costa (E.D.)
[83] 31 R.F.L. (2d) 97

meeting of that Court's judges' Association September 19, 1983 said:

> "there are many orders that are not clear and should be remitted to the original Court for clarification. Some of these have complicated formulae, a variety of ambiguous terminating events, some lump together without apportioning between multiple dependents, etc. . . .
>
> A practical question looms at large. What should be done with enforcement proceedings after ambiguous questions are raised? Do we risk enforcing an order that may have expired?"

I would assume that there is jurisdiction to determine questions such as when a child becomes 16, if that is part of the original order.

Adjournment or Declining to Enforce

As Judge Nasmith mentioned[84] this is a difficult question.

> "do we delay the enforcement by adjourning pending an application to the original court. The latter can take several months and is often viewed by the parties as financially prohibitive . . . the more difficult question is when to adjourn while the application is brought in the original court and under what circumstances to go ahead with the enforcement proceedings".

In Margetts and Stevenson et al[85] the notation in the weekly summary indicates that the adjournment of a show cause hearing on a properly registered Quebec Maintenance Order under British Columbia R.E.M.O. legislation was not a

[84] footnote supra

[85] 18 A.C.W.S. (2d) 104, December 10, 1982, B.C. S.C.

refusal to exercise jurisdiction by the British Columbia Court.[86]

In May 1983 the Saskatchewan Queen's Bench held that while it did not have jurisdiction to cancel arrears, the permitting of an extension of time for payment was contemplated in "enforcement", provided that the extension was not so long as to effectively cancel arrears.[87]

The R.E.M.O. legislation in each instance refers to a provincial statute for its enforcement provisions. It is possible that if the provincial statute says that where the judge "may" enforce the order if cause has not been shown that where cause has been shown Ruttan may be distinguished.[88]

What, however is the position of Federally appointed judges faced with reciprocal enforcement after registration under s.15?

Presumably they are in a more restricted position unless their respective enforcement rules passed under s.19 of the Divorce Act also include a specific or inferred power to adjourn.

[86] The summary does not indicate the nature of the original maintenance order sought to be enforced. If it was a provincial order there are methods of variation available and thus adjournment would not be so henious. If it was a federal nisi (where variation is not possible provincially) then adjournment comes closer to variation.

[87] Gluck v. Gluck, 34 R.F.L. (2d) 103

[88] Glassman v. Glassman (1982) 38 O.R. (2d) 146, 29 R.F.L. (2d) 257 - Ont. Prov. Ct. confirmed by the County Court at 35 R.F.L. (2d) 10

AN ACT RESPECTING THE RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS

(Assented to the 1st day of June, A.D. 1983)

Be it enacted by the Governor and Assembly as follows:

SHORT TITLE

1 This Act may be cited as the Maintenance Orders Enforcement Act.

INTERPRETATION

2 In this Act,

(a) "Attorney General" includes a person authorized in writing by the Attorney General to act for him in the performance of a power or duty under this Act;

(b) "certified copy" means, in relation to a document of a court, the original or a copy of the document certified by the original or facsimile signature of a proper officer of the court to be a true copy;

(c) "claimant" means a person who has or is alleged to have a right to maintenance;

(d) "confirmation order" means a confirmation order made under this Act or under the corresponding enactment of a reciprocating state;

(e) "court" means an authority having jurisdiction to make an order;

(f) "final order" means an order made in a proceeding of which the claimant and respondent had proper notice and in which they had an opportunity to be present or represented and includes

(i) the maintenance provisions in a written agreement between a claimant and a respondent where those provisions are enforceable in the state in which the agreement was made as if contained in an order of a court of that state, and

(ii) a confirmation order made in a reciprocating state;

(g) "maintenance" includes support or alimony;

(h) "order" means an order or determination of a court providing for the payment of money as maintenance by the respondent named in the order for the benefit of the claimant named in the order, and includes the maintenance provisions of an affiliation order;

(i) "provisional order" means an order of a court in the Province that has no force or effect in the Province until confirmed by a court in a reciprocating state or a corresponding order made in a reciprocating state for confirmation in the Province;

(j) "reciprocating state" means a state declared under subsection (2) of Section 19 or under an enactment repealed by this Act to be a reciprocating state and includes a province;

(k) "registered order" means

(i) a final order made in a reciprocating state and filed under this Act or under an enactment repealed by this Act with a court in the Province,

(ii) a final order deemed under subsection (3) of Section 3 to be a registered order, or

(iii) a confirmation order that is filed under subsection (8) of Section 6;

(l) "registration court" means the court in the Province

(i) in which the registered order is filed under this Act, or

(ii) that deemed a final order to be a registered order under this Act or under an enactment repealed by this Act;

(m) "respondent" means a person in the Province or in a reciprocating state who has or is alleged to have an obligation to pay maintenance for the benefit of a claimant, or against whom a proceeding under this Act, or a corresponding enactment of a reciprocating state, is commenced;

(n) "state" includes a political subdivision of a state and an official agency of a state.

FINAL ORDER OF RECIPROCATING STATE

3 (1) Where the Attorney General receives a certified copy of a final order made in a reciprocating state before, on or after the day on which this Act comes into force with information that the respondent is in the Province, the Attorney General shall designate a court in the Province for the purposes of the registration and enforcement and forward the order and supporting material to that court.

REGISTRATION AND NOTICE

(2) On receipt of a final order transmitted to a court under subsection (1) or under a provision in a reciprocating state corresponding to clause (a) of subsection (8) of Section 6, the proper officer of the court shall file the order with the court and give notice of the registration of the order to the respondent.

FINAL ORDER MADE IN PROVINCE

(3) Where a final order is made in the Province before, on or after the day on which this Act comes into force and the claimant subsequently leaves the Province and is apparently resident in a reciprocating state, the court that made the order shall, on the written request of the claimant, the respondent or the Attorney General, deem the order to be a registered order.

VARIED REGISTERED ORDER

(4) A registered order varied in a manner consistent with this Act continues to be a registered order.

SETTING ASIDE REGISTRATION

(5) A respondent may, within one month after receiving notice of the registration of a registered order, apply to the registration court to set the registration aside.

GROUNDS FOR SETTING ASIDE

(6) On application under subsection (5) the registration court shall set aside the registration if it determines that the order was obtained by fraud or error or was not a final order.

WHERE ORDER DETERMINED NOT TO BE FINAL

(7) An order determined not to be a final order and set aside under subsection (6) may be dealt with by the registration court under Section 6 as a provisional order.

PROVISIONAL ORDER

4 **(1)** On application by a claimant before, on or after the day on which this Act comes into force, a court may, without notice to and in the absence of a respondent, make a provisional order against the respondent.

CONTENT

(2) An order under subsection (1) may only include the maintenance provisions the court could have included in a final order in a proceeding of which the respondent had notice in the Province but in which he failed to appear.

TRANSMISSION TO RECIPROCATING STATE

(3) Where a provisional order is made, a proper officer of the court shall send to the Attorney General for transmission to a reciprocating state

(a) three certified copies of the provisional order;

(b) a sworn document setting out or summarizing the evidence given in the proceeding;

(c) a copy of the enactments under which the respondent is alleged to have an obligation to maintain the claimant; and

(d) a statement giving available information respecting identification, location, income and assets of the respondent.

REMISSION FOR FURTHER EVIDENCE

(4) Where, during a proceeding for a confirmation order, a court in a reciprocating state remits the matter back for further evidence to the court in the Province that made the provisional order, the court in the Province shall, after giving notice to the claimant, receive further evidence.

TRANSMISSION OF FURTHER EVIDENCE

(5) Where evidence is received under subsection (4), a proper officer of the court shall forward to the court in the reciprocating state a sworn document setting out or summarizing the evidence with such recommendations as the court in the Province considers appropriate.

CONFIRMATION OF PROVISIONAL ORDER DENIED

(6) Where a provisional order made under this Section comes before a court in a reciprocating state and

confirmation is denied in respect of one or more claimants, the court in the Province that made the provisional order may, on application within six months from the denial of confirmation, reopen the matter and receive further evidence and make a new provisional order for a claimant in respect of whom confirmation was denied.

AFFILIATION NOT PREVIOUSLY DETERMINED

5 **(1)** Where the affiliation of a child is in issue and has not previously been determined by a court of competent jurisdiction, the affiliation may be determined as part of a maintenance proceeding under this Act.

AFFILIATION DISPUTED

(2) If the respondent disputes affiliation in the course of a proceeding to confirm a provisional order for maintenance, the matter of affiliation may be determined even though the provisional order makes no reference to affiliation.

EFFECT OF DETERMINATION OF AFFILIATION

(3) A determination of affiliation under this Section has effect only for the purpose of maintenance proceedings under this Act.

PROVISIONAL ORDER OF RECIPROCATING STATE

6 **(1)** Where the Attorney General receives from a reciprocating state documents corresponding to those described in subsection (3) of Section 4 with information that the respondent is in the Province, the Attorney General shall designate a court in the Province for the purpose of proceedings under this Section and forward the documents to that court.

DUTY OF COURT TO PROCEED

(2) On receipt of the documents referred to in subsection (1), the court shall, whether the provisional order was made before, on or after the day on which this Act came into force, issue process against the respondent in the same manner as it would in a proceeding under the Family Maintenance Act for the same relief and shall proceed, taking into consideration the sworn document setting out or summarizing the evidence given in the proceeding in the reciprocating state.

RESPONDENT OUTSIDE TERRITORIAL JURISDICTION

(3) Where the respondent apparently is outside the territorial jurisdiction of the court and will not return, a proper officer of the court, on receipt of documents under subsection (1), shall return the documents to

the Attorney General with available information respecting the whereabouts and circumstances of the respondent.

DECISION OF COURT

(4) At the conclusion of a proceeding under this Section, the court may make a confirmation order in the amount it considers appropriate or make an order refusing maintenance to any claimant.

CONFIRMATION ORDER FOR PERIODIC PAYMENTS

(5) Where the court makes a confirmation order for periodic maintenance payments, the court may direct that the payments begin from a date not earlier than the date of the provisional order.

PREREQUISITE TO REDUCTION OR DENIAL

(6) The court, before making a confirmation order in a reduced amount or before denying maintenance, shall decide whether to remit the matter back for further evidence to the court that made the provisional order.

INTERIM ORDER

(7) Where a court remits a matter under subsection (6), it may make an interim order for maintenance against the respondent.

DUTY OF COURT UPON CONCLUSION

(8) At the conclusion of a proceeding under this Section, the court, or a proper officer of the court, shall

(a) forward a certified copy of the order to the court that made the provisional order and to the Attorney General;

(b) file the confirmation order, where one is made; and

(c) where an order is made refusing or reducing maintenance give written reasons to the court that made the provisional order and to the Attorney General.

LAW OF RECIPROCATING STATE

7 **(1)** Where the law of the reciprocating state is pleaded to establish the obligation of the respondent to maintain a claimant resident in that state, the court in the Province shall take judicial notice of that law and apply it.

PROOF

(2) An enactment of a reciprocating state may be pleaded and proved for the purposes of this Section by producing a copy of the enactment received from the reciprocating state.

FAILURE TO PLEAD

(3) Where the law of the reciprocating state is not pleaded under subsection (1), the court in the Province shall

(a) make an interim order for maintenance against the respondent where appropriate;

(b) adjourn the proceeding for a period not exceeding ninety days; and

(c) request the Attorney General to notify the appropriate officer of the reciprocating state of the requirement to plead and prove the applicable law of that state if that law is to be applied.

APPLICATION OF LAW OF PROVINCE

(4) Where the law of the reciprocating state is not pleaded after an adjournment under subsection (3), the court shall apply the law of the Province.

STATEMENT OF GROUNDS TO RECIPROCATING STATE

(5) Where the law of a reciprocating state requires the court in the Province to provide the court in the reciprocating state with a statement of the grounds on which the making of the confirmation order might have been opposed if the respondent were served with process and had appeared at the hearing of the court in the Province, the Attorney General shall be deemed to be the proper officer of the court for the purpose of making and providing the statement of the grounds.

VARIATION OF REGISTERED ORDERS

8 (1) The provisions of this Act respecting the procedure for making provisional orders and confirmation orders apply with the necessary changes to proceedings, except under subsection (5), for the variation or rescission of registered orders.

LIMIT ON SECTION

(2) This Section does not

(a) authorize a provincially appointed judge to vary or rescind a registered order made in Canada by a federally appointed judge; or

(b) allow a registered order originally made under a federal enactment to be varied or rescinded except as authorized by federal enactment.

PROVISIONAL ORDER EXCEPTION

(3) Notwithstanding subsection (2), a provincially appointed judge may make a provisional order to vary or rescind a registered order made in Canada under a provincial enactment by a federally appointed judge.

JURISDICTION OF COURT

(4) Subject to subsections (2) and (3) a registration court has jurisdiction to vary or rescind a registered order where both claimant and respondent accept its jurisdiction.

VARIATION UPON APPLICATION OF CLAIMANT

(5) Where the respondent is ordinarily resident in the Province a registration court may, on application by the claimant, vary or rescind a registered order.

CONFIRMATION ORDER FOR VARIATION

(6) A registration court may make a confirmation order for the variation or rescission of a registered order where

(a) the respondent is ordinarily resident in the Province;

(b) the claimant is ordinarily resident in a reciprocating state;

(c) a certified copy of a provisional order of variation or rescission made by a court in a reciprocating state is received by the registration court through the Attorney General; and

(d) the respondent is given notice of the proceeding and an opportunity to appear.

VARIATION UPON APPLICATION OF RESPONDENT

(7) A registration court may, on application by the respondent, vary or rescind a registered order where

(a) the respondent is ordinarily resident in the Province;

(b) the claimant is ordinarily resident in a reciprocating state; and

(c) the registration court, in the course of the proceeding, remits the matter to the court nearest to the place where the claimant lives or works for the purpose of obtaining evidence on behalf of the claimant,

or where

(d) the respondent is ordinarily resident in the Province;

(e) the claimant is not ordinarily resident in a reciprocating state; and

(f) the claimant is given notice of the proceeding.

PROVISIONAL ORDER

(8) Where a claimant ordinarily resident in the Province applies for a variation or rescission of a final order and the respondent is apparently ordinarily resident in a reciprocating state, the court may make a provisional order of variation or rescission and Section 3 applies with the necessary changes to the proceeding.

DEEMED VARIATION

9 Where an order originally made in the Province is varied or rescinded in a reciprocating state under the law in that state corresponding to Section 8, the order shall be deemed to be so varied or rescinded in the Province.

ENFORCEMENT BY COURT

10 **(1)** The registration court has jurisdiction to enforce a registered order notwithstanding that the order

(a) was made in a proceeding in respect of which the registration court would have had no jurisdiction; or

(b) is of a kind that the registration court has no jurisdiction to make.

FAMILY MAINTENANCE ACT APPLIES

(2) The provisions of the Family Maintenance Act for the enforcement of maintenance orders apply with

the necessary changes to registered orders and interim orders made under this Act.

EFFECT OF REGISTERED ORDER

(3) A registered order has, from the date it is filed or deemed to be registered, the same effect as if it had been a final order originally made by the registration court and may, both with respect to arrears accrued before registration, and with respect to obligations accruing after registration, be enforced, varied or rescinded as provided in this Act whether the order is made before, on or after the day on which this Act comes into force.

REGISTERED ORDER AS ORDER OF COURT

(4) Where a registered order is registered with the Supreme Court of Nova Scotia, it may be enforced as if it were an order of that Court.

PROOF OF SERVICE UNNECESSARY

(5) Where a proceeding is brought to enforce a registered order, it is not necessary to prove that the respondent was served with the order.

WHERE ORDER VARIED AFTER REGISTRATION

(6) Where a registered order is being enforced and the registration court finds that the order has been varied by a court subsequent to the date of registration, the registration court shall record the fact of the variation and enforce the order as varied.

RIGHT TO BRING PROCEEDINGS

11 Where the Province, a province, a state or a municipal unit or official agency of the Province or a province is providing or has provided support to a claimant, it has, for the purpose of obtaining reimbursement or to obtain continuing maintenance for the claimant, the same right to bring proceedings under this Act as the claimant.

ENFORCEMENT BY ATTORNEY GENERAL

12 (1) The Attorney General shall, on request in writing by a claimant or an officer or court of a reciprocating state, take all reasonable measures to enforce an order made or registered under this Act.

TRANSMISSION OF DOCUMENT

(2) On receipt of a document for transmission under this Act to a reciprocating state, the Attorney General shall transmit the document to the proper officer of the reciprocating state.

DELEGATION OF POWER OR DUTY

(3) The Attorney General may, in writing, authorize a person to perform or exercise a power or duty given to the Attorney General under this Act.

CLASSIFICATION AS PROVISIONAL OR FINAL

13 (1) Where a document signed by a presiding officer of the court in a reciprocating state or a certified copy of the document is received by a court in the Province through the Attorney General, the court in the Province may deem the document to be a provisional order or a final order, according to the tenor of the document, and proceed accordingly.

DIFFERENT TERMINOLOGY

(2) Where in a proceeding under this Act a document from a court in the reciprocating state contains terminology different from the terminology of this Act or customarily in use in the court in the Province, the court in the Province shall give a broad and liberal interpretation to the terminology so as to give effect to the document.

FOREIGN CURRENCY

14 (1) Where confirmation of a provisional order or registration of a final order is sought and the documents received by a court refer to amounts of maintenance or arrears not expressed in Canadian currency, a proper officer of the court shall first obtain from a bank a quotation for the equivalent amounts in Canadian currency at a rate of exchange applicable on the day the order was made or last varied.

DEEMED AMOUNT

(2) The amounts in Canadian currency certified on the order by the proper officer of the court under subsection (1) shall be deemed to be the amounts of the order.

APPEAL

15 (1) Subject to subsections (2) and (3), a claimant, respondent or the Attorney General may appeal any ruling, decision or order of a court in the Province under this Act, and the Family Maintenance Act applies with the necessary changes to the appeal.

TIME FOR APPEAL

(2) A person resident in the reciprocating state and entitled to appear in the court in the recipro-

cating state in the proceeding being appealed from, or the Attorney General on that person's behalf, may appeal within seventy-five days after the making of the ruling, decision or order of the court in the Province appealed from.

TIME FOR APPEAL BY PERSON RESPONDING

(3) A person responding to an appeal under subsection (2) may appeal a ruling, decision or order in the same proceeding within fifteen days after receipt of notice of the appeal.

EFFECT OF ORDER PENDING APPEAL

(4) An order under appeal remains in force pending the determination of the appeal, unless the court appealed to otherwise orders.

SPOUSES AS WITNESSES

16 (1) In a proceeding under this Act, spouses are competent and compellable witnesses against each other.

PROOF OF OFFICIAL CAPACITY

(2) In a proceeding under this Act, a document purporting to be signed by a judge, officer of a court or public officer in a reciprocating state shall, unless the contrary is proved, be proof of the appointment, signature and authority of the person who signed it.

EVIDENCE FROM RECIPROCATING STATE

(3) Statements in writing sworn by the maker, depositions or transcripts of evidence taken in a reciprocating state may be received in evidence by a court in the Province under this Act.

PROOF OF DEFAULT OR ARREARS

(4) For the purposes of proving default or arrears under this Act, a court may receive in evidence a sworn document made by any person, deposing to have knowledge of, or information and belief concerning the fact.

DUTY TO FURNISH STATEMENT OF AMOUNTS OWING

17 A registration court or a proper officer of it shall, on reasonable request of a claimant, respondent, the Attorney General, a proper officer of a reciprocating state or a court of the state, furnish a sworn itemized statement showing with respect to maintenance under an order

(a) all amounts that became due and owing by the respondent during the twenty-four months preceding the date of the statement; and

(b) all payments made through the court by or on behalf of the respondent during that period.

RESPONDENT CEASES TO BE RESIDENT

18 Where a proper officer of a court in the Province believes that a respondent under a registered order has ceased to reside in the Province and is resident in or proceeding to another province or state, the officer shall inform the Attorney General and the court that made the order of any information he has respecting the whereabouts and circumstances of the respondent and, on request by the Attorney General, a proper officer of the court that made the order or the claimant shall send to the court or person indicated in the request

(a) three certified copies of the order as filed with the court in the Province; and

(b) a sworn certificate of arrears.

REGULATIONS

19 **(1)** The Governor in Council may make such regulations as are necessary or advisable for carrying out effectively the intent and purpose of this Act.

RECIPROCATING STATES

(2) The Governor in Council may, where satisfied that laws are or will be in effect in a state for the reciprocal enforcement of orders made in the Province on a basis substantially similar to this Act, by order, declare that state to be a reciprocating state.

REGULATIONS ACT

(3) The exercise of the authority in this Section shall be regulations within the meaning of the Regulations Act.

OTHER REMEDIES NOT IMPAIRED

20 This Act does not impair any other remedy available to a claimant or another person, the Province, a province, a state or a municipal unit or official agency of the Province or a province.

ORDERS UNDER FORMER ACT

21 Any order made under an enactment repealed by this Act continues, in so far as it is not inconsistent

with this Act, valid and enforceable, and may be rescinded, varied, enforced or otherwise dealt with under this Act.

REPEAL

22 Chapter 173 of the Revised Statutes, 1967, the Maintenance Orders Enforcement Act, is repealed.