UNIVERSITY OF OREGON
School of Law

To: Suzanne Reynolds, Reporter

From: Merle H. Weiner
Philip H. Knight Professor of Law
University of Oregon

Re: Recognition and Enforcement of Canadian Domestic Violence Protection Orders.

Date: July 5, 2014

I again apologize for not being able to attend the upcoming meeting. Although the meeting is relatively close to my home, I depart for Europe on July 12 and therefore am unable to attend. I only have a few recommendations this time. I will not reiterate my suggestions from my last memo even if they were not adopted. I appreciate the Committee's hard work and attention to these issues.

1) There are various places where the references to subsections are incorrect. For example, the reference to subsection (a) on p. 7, line 7 should be (b). Similarly, the reference to subsection (a) on page 9, line 21 should be (b). Again, the reference to subsection (a) on page 10, line 4 should be (b). The reference to subsection (e) on page 10, line 33 should be (a). There is also a typo on page 9, line 25: "slaw" should be "law."

2) States may have trouble criminally enforcing Canadian protective orders with the Act as written. The commentary suggests that criminal enforcement is desired. It states, "Most states provide that the violation of a protection order is a misdemeanor…These consequences would likewise attach to violation of a Canadian protection order." *See* page 6, line 12-13, 17.

Unfortunately, some criminal courts may find themselves without the authority to enforce a Canadian restraining order even though they have the ability to enforce a domestic restraining order. First, the Act authorizes a "tribunal" to enforce (see § 4(b)), but the definition of "tribunal" could exclude criminal courts. The definition is "a court, agency, or other entity of this state authorized by law to issue or modify a domestic protection order." Page 6, lines 6-7. This definition could be read as referencing a domestic relations court, although the definition of "domestic protection order" suggests that the relevant "tribunal" could include a criminal court. This ambiguity is compounded by the language in section 4(b), which says that a tribunal has the ability to "issue an order enforcing a valid Canadian protection order on application…" This language connotes civil enforcement, such as civil contempt. A criminal defense lawyer will

FACULTY OFFICES
1515 Agate Street, 1221 University of Oregon, Eugene OR 97403-1221

use existing statutory language to buttress the conclusion that a criminal court lacks the ability to enforce the Canadian order. For instance, the commentary includes the language of North Carolina law (on page 6, lines 13-16), and this language illustrates the problem. It says: "Except as otherwise provided by law, a person who knowingly violates a valid protective order entered pursuant to this Chapter or who knowingly violates a valid protective order entered by the courts of another state or the courts of an Indian tribe shall be guilty of a Class A misdemeanor." Since North Carolina's law excludes a foreign country's order from its parameters, a court might be unwilling to interpret the new Uniform Act to permit such a prosecution if the Act doesn't expressly say that such is permitted. A canon of statutory interpretation suggests that any ambiguity is typically resolved in favor of the criminal defendant.

The Act's other language does not solve the problem. Section 4(c) says that the same procedures shall apply for enforcing the Canadian and domestic order, but the issue here is not procedural but rather substantive.

It would be unfortunate if Canadian protection orders were only amenable to civil enforcement. Compared to criminal prosecution, contempt adjudicated in the civil system may have the following disadvantages: different (and lower) penalties; constitutional restrictions on an interested party's ability to bring an action if the penalty is punitive; and practical difficulties when the victim must seek enforcement.

In my opinion, this problem could be corrected by adding a provision that states that the civil and criminal penalties that apply to a violation of a domestic protection order also apply to the violation of a Canadian protection order. I might also modify the definition of tribunal to make clear that a criminal court is a tribunal too by stating that a "tribunal" is "a court, agency, or other entity of this state authorized by law to issue, modify, or enforce a domestic protection order."

3) Section 5, Registration of Canadian Protection Order, appears to follow the approach in the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act. This is a good system, but it is a one-sided registration system with no notice to the respondent. Therefore, I believe the commentary should not say, "the provision tries to ensure that all parties have the opportunity to provide relevant information to the state." I think this sentence was written in reference to the respondent's ability to register an order also, but it nonetheless is confusing.

4) Finally, the Committee has apparently decided not to make criminal orders enforceable in the U.S., even if Canada makes them privately enforceable. This position is contrary to the position in the UIEDVPOA, which would make a privately enforceable criminal order enforceable (but not other criminal orders). Frankly, I do not know if any court in Canada makes its criminal protection orders privately enforceable. Such an inquiry seems prudent because the Committee may be leaving a large number of victims unprotected. Regardless of what the Committee ultimately decides with respect to criminal protection orders, I recommend adding to the commentary language that encourages States to enact a separate criminal law that would provide for the prosecution of individuals who violate a criminal order (e.g., a stay away order where the remedy is bond revocation in Canada).