CANADIAN POWER OF ATTORNEY & GUARDIANSHIP REGIME: FOREIGN ORDERS, RESEALING & JURISDICTIONAL ISSUES

Co-authored by

Kimberly Whaley, Bryan Gilmartin, and Henry Howe

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INTRODUCTION

As people and their assets have become more mobile in recent years, the need for interjurisdictional approaches to substitute decision-making has increased. Many people own property in more than one jurisdiction. Some travel frequently between jurisdictions, spending part of each year in one and the rest in another. Others have more permanently moved in the course of their lives, but continue to maintain strong connections to the places they moved from. These situations are especially common among the elderly.

It is therefore necessary that laws governing powers of attorney ("POAs"), guardianship, and other substitute decision-making mechanisms adapt to an increasingly globalized world. Ontario's government has taken steps to address this need in sections 85 and 86 of the *Substitute Decisions Act* (the "*SDA*")[1] which address the recognition of foreign POAs and guardianship orders. However, as demonstrated in the case of *Cariello v Father Michele Perrella*,[2] there remain gaps in the legislation that can severely limit its usefulness.

Without updated legal mechanisms, incapable people and their substitute decision-makers might encounter various practical issues. While foreign powers of attorney are relatively easily recognized in Ontario, the difficulty of having any guardianship order from outside of Canada recognized could create confusion, uncertainty, and barriers to any action to meet an incapable person's needs. Attorneys and guardians are deeply involved in nearly all aspects of an incapable person's life, including property, personal finance, and healthcare decisions. A bank might refuse to act on a foreign POA for property if it is not satisfied that the POA is recognized in Ontario, and an incapable grantor might have no recourse in this situation without a court order. Absent any recognized guardian of the person or attorney for personal care, a healthcare provider might turn to a different

[1] SO 1992, c 30
[2] 2013 ONSC 7605

substitute decision-maker under the terms of the *Health Care Consent Act*,[3] despite a substitute decision-maker having already been chosen by the incapable person or a court.

There are various ways in which the legislative gaps could be addressed by the government. A simple regulation could at least partially resolve the immediate problem with section 86, though not the underlying flaws of Ontario's current approach to choosing which foreign guardianship orders to recognize. Other provinces and territories have developed different legislative methods of dealing with foreign POAs and guardianship orders, and Ontario could use one of these or its own *Rules of Civil Procedure*[4] as a model for legislative amendments. There may also be some relief available to parties affected by the current legislative flaws under the rules of private international law, though this approach does not appear to have been tested yet, and is not certain to offer any relief at all.

SECTIONS 85 AND 86 OF THE *Substitute Decisions Act*

Section 85 of the *SDA* governs the recognition of foreign POAs. Section 86 governs the resealing of foreign court orders with respect to guardianships or like duties under S.86(1), which is the process by which those orders can be officially recognized and enforced by the Ontario court. For the purposes of these sections, a "foreign POA" or "foreign order" is one that was made in any jurisdiction outside of Ontario, which includes any other province or territory of Canada.

Section 85

Section 85 provides that a POA is considered validly executed if, at the time of its execution, it "complied with the internal law," excluding choice of law rules,[5] of any of the following places:

(a) The place where the POA was executed

[3] SO 1996, c 2, Sch A
[4] RRO 1990, reg 194
[5] SO 1992, c 30 at s 85(2)

(b) The place where the grantor was then domiciled; or

(c) The place where the grantor had their habitual residence.[6]

In other words, a POA is valid in Ontario if it was validly executed in either the jurisdiction where it was executed or the jurisdiction where the grantor lives. The same rules also apply to the revocation of a POA.[7]

Section 85 does not allow for the complete reciprocal enforcement of foreign law with respect to the valid execution of a POA, as it includes the following qualifiers:

> (4) If, under this section or otherwise, a law in force outside Ontario is to be applied in relation to a continuing power of attorney or a power of attorney for personal care, the following requirements of that law shall be treated, despite any rule of that law to the contrary, as formal requirements only:
>
> 1. Any requirement that special formalities be observed by grantors answering a particular description.
>
> 2. Any requirement that witnesses to the execution of the power of attorney possess certain qualifications.[8]
>
> (5) In determining for the purposes of this section whether or not the execution of a continuing power of attorney or power of attorney for personal care conforms to a particular law, regard shall be had to the formal requirements of that law at the time the power of attorney was executed, but account shall be taken of an alteration of law affecting powers of attorney executed at that time if the alteration enables the power of attorney to be treated as properly executed.[9]

The rules in section 85 apply to both powers of attorney for property and powers of attorney for personal care.[10]

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[6] SO 1992, c 30 at s 85(1)
[7] SO 1992, c 30 at s 85(3)
[8] SO 1992, c 30 at s 85(4)
[9] SO 1992, c 30 at s 85(5)
[10] SO 1992, c 30 at s 85(6)

Section 86

Section 86 applies to any court order from outside of Ontario that:

- appoints a person;
- to have "duties comparable to those of a guardian of property or guardian of the person"; and,
- for another person who is at least 16 years old.[11]

An order of this nature can, on an application to the court, be resealed if:

- The order was made in another province or territory of Canada; or
- The order was made in any other jurisdiction prescribed by the government of Ontario.[12]

An application for resealing must include both a copy of the foreign order that either bears the foreign court's seal or has been certified by some officer of that court, and a certificate stating that the order has not been revoked and is of full effect.[13] Once an order has been resealed, it has the same effect in Ontario as a guardianship order made under the *SDA*, and is subject to any *SDA* provisions or court-imposed conditions with respect to an Ontario guardianship order.[14]

Subsection 90(g) authorizes the Lieutenant Governor in Council to make a list of prescribed jurisdictions for the purposes of section 86.[15] Currently, none exist.

Legislative Gap

Although section 85 is a useful and fairly straightforward tool for the recognition of foreign POAs, section 86 appears to be of limited use in addressing contentious guardianship proceedings that involve orders from outside of Canada. The reason for this problem is that the government has so far not prescribed any jurisdiction to which section 86 can be

[11] SO 1992, c 30 at s 86(1)
[12] SO 1992, c 30 at s 86(2)
[13] SO 1992, c 30 at s 86(3)
[14] SO 1992, c 30 at s 86(4)
[15] SO 1992, c 30 at s 90(g)

applied by the courts. Section 86 does allow for any guardianship order made in Canada to be resealed, but so far appears to be completely ineffective with respect to an order made anywhere else. Without a list of prescribed jurisdictions, the *SDA* effectively provides no mechanism at all for the recognition of a non-Canadian order, and the court can effectively only recognize a Canadian order.

This problem has been raised at least once by the court, in the case of *Cariello v Father Michele Perrella*.[16]

CARIELLO V FATHER MICHELE PERRELLA

Facts

Father Michele Perrella ("Fr. Perrella") had moved from Italy to Toronto in 1969. He had eventually become a Canadian citizen, while also remaining an Italian citizen.[17] In 2001, he returned to Italy, and executed a Consular Declaration in which he stated that he intended his return to be permanent.[18] Although he subsequently spent "some years" living in other countries,[19] he traveled on his Italian passport,[20] and by 2010 he was registered as an Italian citizen living in Italy.[21]

In 2011, Fr. Perrella planned a temporary trip to Toronto, for a period of two-and-a-half weeks.[22] While in Toronto, he suffered a medical incident that apparently caused a decline in his cognitive function.[23] He subsequently refused to board his return flight to Italy,[24] and was eventually moved to a long-term care facility in Toronto.[25] Medical assessors determined that he exhibited "advanced dementia".[26]

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[16] 2013 ONSC 7605
[17] 2013 ONSC 7605 at para 8
[18] 2013 ONSC 7605 at para 9
[19] 2013 ONSC 7605 at para 10
[20] 2013 ONSC 7605 at para 12
[21] 2013 ONSC 7605 at para 13
[22] 2013 ONSC 7605 at para 14
[23] 2013 ONSC 7605 at para 15
[24] 2013 ONSC 7605 at para 17
[25] 2013 ONSC 7605 at para 5
[26] 2013 ONSC 7605 at paras 23-24

Though likely incapable by this time, Fr. Perrella purportedly executed POAs that named two of his longtime friends in Toronto.[27] Meanwhile, Fr. Perrella's brother brought an application for a guardianship appointment in Italy, and the Italian court appointed a lawyer named Maria Cariello ("Cariello") as interim guardian.[28] Cariello traveled to Toronto, and asked the Ontario court to reseal the Italian guardianship order, or at least set aside Fr. Perrella's purported POAs.[29] Fr. Perrella's friends agreed that the POAs should be set aside, but asked that one of them be appointed his guardian of property and the person.[30]

Decision

Justice Mesbur first addressed whether the court could reseal the Italian guardianship order, and found that it could not. She later found that the Ontario court lacked jurisdiction to appoint a guardian for Fr. Perrella, and that Fr. Perrella's purported POAs were invalid.

Justice Mesbur's conclusion with respect to resealing the Italian order was simple: Because the government had not made Italy a prescribed jurisdiction for the purposes of section 86, the court had no authority to reseal the order. She summarized this decision in the following remarks:

> It seems to me that unless and until Ontario creates a list of "prescribed jurisdictions" there is simply no legislative basis on which I can apply s. 86. This is not a case where the statute inadvertently fails to deal with an issue. Here, the province has simply failed to take the regulatory steps necessary to create a list of prescribed jurisdictions to which s.86 would apply. I have no idea of the province's intentions in that regard. I fail to see how I can simply assume Ontario would designate Italy as a prescribed jurisdiction when it finally creates a list of prescribed jurisdictions under the SDA. I have no basis to conclude that Ontario has any intention of having s.86 apply to any jurisdiction other than another Canadian province or territory. Section 86 cannot apply.[31]

With respect to whether the Ontario court had jurisdiction to appoint a guardian for Fr. Perrella, Justice Mesbur first observed that neither Canada, nor, Italy had implemented

[27] 2013 ONSC 7605 at para 21
[28] 2013 ONSC 7605 at paras 25-26
[29] 2013 ONSC 7605 at para 39
[30] 2013 ONSC 7605 at para 40
[31] 2013 ONSC 7605 at para 48

the *Hague Convention on the International Protection of Adults*.[32] In the absence of an international agreement that governed the issue of jurisdiction, she turned instead to the general conflict of law rules with respect to "matters of a person's status,"[33] including capacity.

This analysis turned on the question of where Fr. Perrella was domiciled since it would be the laws of that place that would determine a matter of this sort.[34] Justice Mesbur found that, although Fr. Perrella had made Ontario his domicile earlier in his life,[35] his domicile at the time of his incapacity had clearly been Italy.[36] When he had previously left Toronto, he had expressed a clear intention to permanently return to Italy. He was registered as a resident in Italy, and most of his assets and family members were there. He had cumulatively lived longer in Italy than anywhere else. When he had traveled to Toronto in 2011, he had purchased a return ticket to Italy, had not expressed any intention to return to Ontario long-term, and had recently expressed a need to return to Italy. Justice Mesbur expressed doubt that Fr. Perrella had even been capable of deciding to change his domicile when he had returned to Ontario.[37]

It was, in Justice Mesbur's view, "the Italian court that must take the jurisdiction to determine his capacity and ancillary matters arising from that determination".[38]

With respect to the POAs, Justice Mesbur found that it was highly likely, that Fr. Perrella had been incapable when he had executed them, and they were therefore invalid.[39]

Although the Justice Mesbur declined to reseal the Italian guardianship order, the ultimate outcome was that the Ontario court recognized Cariello's authority to make decisions with respect to Fr. Perrella's property and personal care. Instead of section 86, the reasons for this outcome were that Fr. Perrella had no valid substitute decision-making arrangement made in Ontario, and the Ontario court declined jurisdiction with respect to

[32] 2013 ONSC 7605 at para 51
[33] 2013 ONSC 7605 at para 53
[34] 2013 ONSC 7605 at para 53
[35] 2013 ONSC 7605 at para 64
[36] 2013 ONSC 7605 at paras 66, 77
[37] 2013 ONSC 7605 at paras 69-76
[38] 2013 ONSC 7605 at para 77
[39] 2013 ONSC 7605 at para 84

his capacity and deferred to the jurisdiction of the Italian court, which had appointed Cariello.[40]

Analysis

The *Cariello* decision is potentially confusing because, even though the specific application under section 86 failed, the court still delivered the applicant's desired outcome. The reason for this was in the particular facts of the case, where the incapable person resided outside of Ontario, and was clearly only making a temporary visit to Ontario at the time of his medical incident.

It is entirely plausible, in a world where people are increasingly mobile, that a situation of this nature might affect a person whose domicile is not so easily established outside of Ontario, and that the Ontario court in that situation might find that it does have jurisdiction with respect to that person's capacity. In such a situation, the apparent deficiencies of section 86 could easily prevent the foreign order from having any effect in Ontario, and might result in a need for a new order, or even a conflicting order like the one sought by the respondents in *Cariello*. The fact that the situation essentially resolved itself in one case does not eliminate the broader problem.

One might question whether the issue of section 86 was decided correctly in *Cariello*. Whether or not section 86 has the appearance of a statutory provision that inadvertently fails to address the issue, the government's regulatory inaction has resulted in a situation where the statute appears to attempt to address an issue, but entirely fails to do so. It might well be the case that the government did intend to allow for recognition of orders from outside of Canada and in its oversight failed to take every step to complete this goal. Perhaps the effectiveness of section 86 with respect to an order from outside of Canada should not be understood to be dependent on a separate government action that might never occur. After all, what is the meaning of a statutory provision that can be made entirely useless by regulatory inaction?

[40] 2013 ONSC 7605 at paras 85-87

On the other hand, Justice Mesbur may have been purposeful and entirely correct to take a cautious approach to a situation in which the government's intentions are not clearly expressed. The paragraph excerpted above identifies two key areas where the government's actions have left room for doubt. First, if the government specifically intended to allow for the resealing of guardianship orders from outside of Canada, it could have completed the regulation that the statute demands. Its failure to do so may indicate a possible intention not to immediately address this issue, but merely to give itself a tool through which to address the issue later if it saw fit. In the meantime, section 86 does continue to have some effect, in that it allows for the resealing of guardianship orders made in other parts of Canada.

Second, every guardianship order that was made outside of Canada was made in some specific other place. As noted by Justice Mesbur, even if one assumes that the government intended that section 86 would allow for the resealing of orders from some jurisdictions outside of Canada, it is not specifically clear that it intended Italy to be one of those jurisdictions. The government did not write specific criteria for a jurisdiction whose orders can be recognized into the legislation. Instead, it chose an approach where it could simply list names. It would be difficult for a court to guess what names those should have been.

In any event, it would likely be best that the legislature, rather than the courts, undertake to resolve the issue of the recognition of foreign guardianship orders.

It is, finally, interesting that Justice Mesbur took some time in her decision to comment on the Italian guardianship process. She noted that the Italian decision "reflect[ed] both a sensitivity to Fr. Perrella's wishes… and to his need for the court's overriding 'care and protection,'" that his guardian had been chosen from an approved list and would be subject to court supervision, and that the Italian court would ensure that Fr. Perrella's "interests as a vulnerable person [would] be properly protected".[41] One might wonder whether the decision might have somehow been different had she been less impressed with the Italian process, and whether her observations might provide some sort of

[41] 2013 ONSC 7605 at paras 90-91

guidance on what criteria Ontario should look for if it does eventually begin to recognize guardianship orders from outside of Canada.

POTENTIAL SOLUTIONS

There are currently two solutions available to people who are affected by the problems described, and both have clear shortcomings. A person can avoid the need to have a foreign POA or guardianship order recognized in Ontario by executing new POAs in Ontario. This option is, however, not available when the person in question is already incapable. In that situation, the only clear solution is to bring a new application for guardianship in Ontario, and to take on the costs and delays associated with that application.

A better solution is likely to require some sort of action by the government, though it is unclear whether the courts might still be able to resolve the matter in some way.

Prescribed Jurisdictions

The simplest way in which the government could address the problem, though not the most effective, would be to prescribe jurisdictions outside of Canada to which section 86 of the *SDA* can be applied by the courts.

This approach might not be preferable because the government would need to evaluate the many different guardianship processes of a wide variety of foreign jurisdictions and would need to positively choose every one whose orders could be recognized. It would also fall to the government to ensure that the regulation is appropriately updated as guardianship law evolves throughout the world, which is likely a difficult task to expect of a government that has so far not prescribed anything in this area at all.

It may be better to shift to an approach that ties recognition of foreign orders to certain statutory criteria, instead of a list of individual jurisdictions. This approach too, however, would require changes to the existing legislation.

Approaches of Other Provinces and Territories

Other provinces have taken different approaches to the recognition of foreign substitute decision-making arrangements, and some of them could provide a model for legislative change in Ontario.

Powers of Attorney and Similar Documents

British Columbia, for example, deems a foreign POA to be a valid enduring power of attorney if it:

(a) applies or continues to apply when an adult is incapable;

(b) was made in a jurisdiction outside British Columbia; and

(c) complies with any prescribed requirements.[42]

The current prescribed requirements are listed in the *Power of Attorney Regulation*.[43] The POA in question must be one that:

(a)grants a power of attorney to a person that continues to have effect while, or comes into effect when, the adult is incapable of making decisions about the adult's financial affairs,

(b)was made by a person who was, at the time of its making, ordinarily resident

(i)outside British Columbia but within Canada, or

(ii)within the United States of America, the United Kingdom of Great Britain and Northern Ireland, Australia or New Zealand,

(c)was validly made according to the laws of the jurisdiction in which

(i)the person was ordinarily resident, and

(ii)the instrument was made, and

[42] *Power of Attorney Act*, RSBC 1996, c 370 at s 38
[43] BC Reg 20/2011

(d)continues to be effective in the jurisdiction in which the instrument was made.[44]

The POA must be accompanied by a certificate from a solicitor licensed to practice in the jurisdiction in which it was made, which indicates that the POA complies with the above requirements.[45]

Manitoba similarly recognizes a foreign POA executed in another jurisdiction as a valid enduring power of attorney if:

(a) it is valid according to the law of that place; and

(b) it provides that it is to continue despite the mental incompetence of the donor after the execution of the document.[46]

New Brunswick's requirements are that:

(a) a person gives another person authority under the document to act on the person's behalf in relation to property and financial affairs, personal care or both;

(b) the person who is given authority may exercise the authority when the other person lacks capacity; and,

(c) the document is valid according to the law of the place where it was made.[47]

In the Northwest Territories, a springing or enduring power of attorney from another jurisdiction is recognized if:

(a) it is valid according to the law of that place; and

(b) it provides the appropriate statement as to its commencement or continuation, as referred to [elsewhere in the statute].[48]

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[44] BC Reg 20/2011 at s 4(2)
[45] BC Reg 20/2011 at s 4(3)
[46] *Powers of Attorney Act*, CCSM c P97 at s 25
[47] *Enduring Powers of Attorney Act*, SNB 2019, c 30 at s 25
[48] *Powers of Attorney Act*, SNWT 2001, c 15 at s 25

Nunavut has an almost identical provision.[49]

Some Canadian jurisdictions do not have anything called a "power of attorney for personal care," but do have a somewhat similar instrument with a different name, such as a "personal directive" or a "health care directive".

Prince Edward Island will recognize a foreign health care directive if:

> (a) it meets the formal requirements of [execution in Prince Edward Island]; or
>
> (b) it was made under and meets the formal requirements established by the legislation of
>
> > (i) the jurisdiction where the directive was made, or,
> >
> > (ii) the jurisdiction where the person who made the directive was habitually resident at the time the directive was made.[50]

To establish that a directive was validly executed in another jurisdiction, a substitute decision-maker "may rely on a certification by a person purporting to be a lawyer or notary public in a jurisdiction certifying that the directive meets the formal requirements of the jurisdiction".[51]

Similarly, Nova Scotia will recognize a foreign substitute decision-making instrument for personal care if it was executed in the form required:

> (a) in [the Nova Scotia statute]; or
>
> (b) in the legislation of
>
> > (i) the jurisdiction where the instrument was made; or,
> >
> > (ii) the jurisdiction where the person who made the instrument was habitually resident at the time the instrument was made.[52]

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[49] *Powers of Attorney Act*, SNu 2005, c 9 at s 26
[50] *Consent to Treatment and Health Care Directives Act*, RSPEI 1988, c C-17.2 at s 34(1)
[51] RSPEI 1988, c C-17.2 at s 34(2)
[52] *Personal Directives Act*, SNS 2008, c8 at s 24

The Northwest Territories will recognize a foreign personal directive if:

> (a) a lawyer entitled to practice law in that jurisdiction has certified in writing that the directive meets the requirements relating to the formalities of execution for personal directives under the legislation of that jurisdiction; or,
>
> (b) the directive would have met the applicable [statutory] requirements… had it been made in the Northwest Territories.[53]

Orders Appointing Guardians

Alberta has taken a similar legislative approach to that of Ontario, in that its court may reseal a foreign guardianship order made in any other jurisdiction in Canada, or any jurisdiction outside of Canada prescribed by the Lieutenant Governor in Council.[54]

Alberta, like Ontario, does not appear to have prescribed any such jurisdictions outside of Canada. The effect of its provision, absent any prescribed jurisdictions, does not appear to have been tested in court.

The Yukon Territory also takes a similar approach,[55] but its government has prescribed a list. The current list consists of Australia, Austria, Belgium, Denmark, Eire, England, Finland, France, Germany, Iceland, Italy, the Netherlands, New Zealand, Northern Ireland, Norway, Portugal, Scotland, Spain, Sweden, Switzerland, any state of the United States, and Wales.[56]

On the other hand, Saskatchewan's legislation might provide a solution to the problem facing Ontario. Instead of attempting to list specific jurisdictions whose guardianship orders can be resealed, Saskatchewan has developed criteria that can be applied to a guardianship order from any jurisdiction. A person who applies for a foreign guardianship ordered to be resealed is required to:

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[53] *Personal Directives Act*, SNWT 2005, c 16
[54] *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2
[55] *Adult Protection and Decision Making Act*, SY 2003, c 21, Sch A at s 56
[56] *Adult Protection and Decision-Making Regulations*, YOIC 2005/78 at s 18

(a) produce to and deposit with a local registrar of the court the foreign order to be resealed;

(b) pay the prescribed fees;

(c) in the case of an applicant who has duties comparable to those of a property guardian:

(i) provide the local registrar of the court with an accurate inventory of the estate of the adult in Saskatchewan so far as this information has come to the knowledge of the applicant:

(A) stating the income and profits of the estate; and,

(B) setting out the assets, debts and credits of the adult; and,

(ii) if property in Saskatchewan belonging to the estate is discovered after the filing of an inventory pursuant to subclause (i), provide the local registrar of the court with an accurate inventory of the estate immediately on the property being discovered; and

(iii) verify by affidavit every inventory required pursuant to this clause; and (d) serve a copy of the application in accordance with section 65.3.[57]

A court may require a guardian to file one or more bonds, in an amount chosen by the court. A bond is not required if the court is given a certificate from an officer of the foreign court which states that security in a sufficient amount has been given there, or if the value of the incapable person's estate is less than a prescribed amount.[58]

The application for resealing must be served on:

(a) the [incapable] adult;

[57] *Adult Guardianship and Co-decision-making Act*, SS 2000, c A-5.3 at s 65.1
[58] SS 2000, c A-5.3 at s 65.2

(b) the nearest relatives within the meaning of [the statute], except any nearest relative who has consented in the prescribed form to the order requested in the application;

(c) the member of the Executive Council responsible for the administration of The Child and Family Services Act if the adult is receiving services pursuant to section 10 or 56 of The Child and Family Services Act;

(d) the personal decision-maker in Saskatchewan of the adult;

(e) the property decision-maker in Saskatchewan of the adult;

(f) any attorney under a power of attorney given by the adult, if known;

(g) any proxy under a health care directive made by the adult, if known;

(h) any supporter nominated by the adult pursuant to section 9 of The Personal Care Homes Regulations, 1996, if known;

(i) any person who acts as a trustee for the purpose of administering financial benefits on behalf of the adult, if known; and,

(j) the public guardian and trustee.[59]

Nova Scotia takes a similar approach to Saskatchewan, including the requirement, if the guardianship is with respect to property, to provide an inventory of the incapable person's property in the province to the court, and the update that inventory as needed. The court may impose terms, conditions, or limits on its order, and may require the guardian to account. The court may not reseal a foreign guardianship order until it has received a certificate from an officer of the foreign court which confirms that the order is in effect, and it has received any necessary bond. A bond is not necessary if the court chooses to dispense with the requirement for one, or if the court receives a certificate from an officer

[59] SS 2000, c A-5.3 at s 65.3

of the foreign court which states that security in a sufficient amount has been given there.[60]

In the Northwest Territories, the court can reseal a foreign guardianship order if it has received a certificate from the foreign court. The Northwest Territories court may impose conditions, restrictions, or modifications on the order. It must review the resealed order withing a specified amount of time.[61]

The approach of Saskatchewan or Nova Scotia, if it were adopted in Ontario, would appear to completely resolve the issues raised in *Cariello* with respect to the *SDA*.

Rules of Civil Procedure

Another legislative option for the government of Ontario can be found in Rules 74.08 and 74.09 of the *Rules of Civil Procedure*, which make provisions for the resealing of certain foreign orders to appoint estate trustees. An appointment of an estate trustee, with or without a will, can be resealed if it was made in the United Kingdom, another province or territory of Canada, or "any British possession," and the Ontario court is provided with:

(a) two certified copies of the document under the seal of the court that granted it, or the original document and one certified copy under the seal of the court that granted it;

(b) the security required by the Estates Act; and

(c) such additional or other material as the court directs.[62]

The same requirements exist for a certificate of ancillary appointment of an estate trustee with a will, with respect to an appointment made in a jurisdiction other than the ones listed above, except the Ontario court requires two certified copies of the document under the seal of the court that granted it.[63]

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[60] *Adult Capacity and Decision-making Act*, SNS 2017, c4 at s 65
[61] *Guardianship and Trusteeship Act*, SNWT 1994, c 29 at s 15
[62] RRO 1990, reg 194 at R 74.08
[63] RRO 1990, reg 194 at R 74.09

Instead of adopting the approach used in another province, Ontario could develop something similar to this process to apply to foreign guardianship orders.

Private International Law

In *Morguard Investments Ltd v De Savoye*,[64] the Supreme Court of Canada established a "real and substantial connection" test with respect to whether the courts of one province should recognize judgementss made in other provinces. Since this decision, the standard for the enforcement of certain extraprovincial judgements has been whether such a connection exists between the foreign jurisdiction and the subject matter of the claim. In *Beals v Saldanha*,[65] the court recognized that the law needed to adapt to the increasing movement of people across borders, and extended the "real and substantial connection" test to apply to judgements made by courts outside of Canada. In *Pro Swing Inc v Elta Golf Inc*,[66] the court further extended the test to apply to non-monetary judgements, though the majority stated that "courts must be cautious to preserve their nation's values and protect its people".[67]

Whether a foreign order to appoint a guardian can be recognized as a non-monetary order under the "real and substantial connection" test does not appear to have been tested so far. If the government of Ontario does not do something to resolve the problem in the *SDA*, it is possible that some litigant will eventually explore this option.

[64] 1990 CanLII 29 (SCC), [1990] 3 SCR 1077
[65] 2003 SCC 72 (CanLII), [2003] 3 SCR 416
[66] 2006 SCC 52 (CanLII), [2006] 2 SCR 612
[67] 2006 SCC 52 (CanLII), [2006] 2 SCR 612 at para 64