RECOGNITION OF FOREIGN GUARDIANSHIP ORDERS IN ONTARIO

ADDRESSING THE LEGISLATIVE GAP

Bryan Gilmartin

WEL Partners

www.welpartners.com

WHALEY ESTATE LITIGATION PARTNERS

CONTENTS

I. INTRODUCTION

In our modern society, people and their assets have become more mobile. Individuals are assuming ownership of property in multiple jurisdictions. This has led to some frequently travelling between jurisdictions, often spending portions of the year in one and the remainder in another. These scenarios are most common amongst older adults, especially those who have retired from the workforce. What's more, the growing population in Canada is rapidly aging and experiencing heightened levels of cognitive decline and disability. All of this has led to an increased need for interjurisdictional approaches to substitute decision-making.

Research indicates that a significant number of foreign nationals, especially from the United States of America, currently own property in Canada. Unfortunately, in Ontario, the current laws which govern powers of attorney, guardianship, and other substitute decision-making mechanisms have yet to adequately adapt to our increasingly globalized world.

The Issue in Ontario

In Ontario, matters concerning the recognition of powers of attorney ("**POAs**") and guardianship orders are governed by sections 85 and 86 of the *Substitute Decisions Act* (the "***SDA***")[1]. Despite the SDA allowing for a relatively easy recognition of POAs and guardianship orders from other Canadian provinces, it features substantial gaps where it concerns guardianship orders from jurisdictions outside of Canada.

The practical concerns stem from the fact that attorneys and guardians are acutely involved in virtually all aspects of a grantor's life including the management of property, and personal care. A financial institution may refuse to act on a foreign POA for property if it is not satisfied that the POA is recognized in Ontario. As a result, a grantor, especially if incapable, may have no recourse in this situation without a court order.

The practical barriers also concern personal and real property of an individual under guardianship. As Ontario's legislation has not fully adapted to the constraints and

[1] SO 1992, c 30 [*SDA*].

demands of modern society, guardians appointed in foreign jurisdictions have limited options when it comes to dealing with an incapable person's statute in Ontario. At present, this may require a *de novo* application for guardianship in Ontario; bringing with it, the prohibitive considerations of time and cost in addition to the practical consideration of who to appoint as guardian.

The current regime

Under the *SDA*, section 86 provides a mechanism for recognizing foreign guardianship orders made outside the province. The provision applies to any court order from outside 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. This section holds that an order of this nature can be resealed, on application to the court, 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 (SO 1992, c 30 at s 86(2)). [emphasis added].

Pursuant to subsection 86(4) of the *SDA*, a resealed order:

> (a) has the same effect in Ontario as if it were an order under this Act appointing a guardian of property or guardian of the person, as the case may be;
>
> (b) is subject in Ontario to any condition imposed by the court that the court may impose under this Act on an order appointing a guardian of property or guardian of the person, as the case may be; and
>
> (c) is subject in Ontario to the provisions of this Act respecting guardians of property or guardians of the person, as the case may be. (SO 1992, c 30 at s 86(4)).

However, Ontario has not "prescribed" any jurisdictions rendering s.86 inoperative, notwithstanding that the SDA permits the lieutenant governor in council to do so.

II. THE GROWING NEED

Foreign Ownership in Ontario

In Canada, ownership of property by non-Canadians is common. Many of these owners are holding multiple properties, some in multiple Canadian jurisdictions. In 2020, approximately 3.5 per cent of homeowners in Canada were non-resident owners, representing roughly 340,735 people. Over 1 in 10 (10.2 per cent) of these non-resident

owners held multiple properties in the same region. Effective January 1, 2022, the federal government imposed a two-year ban on non-resident purchasing of residential property.[2] Notably, recreational property such as cabins, cottages, and other vacation homes have been exempted from this prohibition.[3]

Terry Rees, Executive Director of the Federation of Ontario Cottagers, shares that historically, the American owners of property in Ontario, "came here to vacation with their steamer trunks in the Muskokas in the 1800's, or they came to Frontenac and eastern Ontario to hunt and fish. There are still a lot of people from upstate New York, Pennsylvania, Ohio, whose families came to Canada a long time ago and have a longstanding stake here".[4] These days, its not just cottage country that is particularly popular amongst American buyers.[5] As shared by McGrath, approximately 9 per cent of residential properties in Fort Erie (a small Niagara-region town on the U.S. Canadian border) are owned by US citizens.[6]

In 2020, there were 187,325 non-resident homeowners in Ontario, 19,120 (10.2 per cent) of whom owned multiple properties.[7] Where it concerns the ownership of condominiums, non-residents accounted for 6.5 per cent of all purchases in 2020.[8] Of these non-residents, persons aged 55 and older were overrepresented among homeowners relative

---

[2] *Prohibition on the Purchase of Residential Property by Non-Canadians Act*, SC 2022, c 10, s 235.
[3] Prohibition on the Purchase of Residential Property by Non-Canadians Regulations, P.C. 2022-250, 2 December, 2022, SOR/2022-250, Canada Gazette, Part II, vol. 156, no. 26.
[4] John Michael McGrath, "Ontario's hottest hot spot for foreign-owned homes is Fort Erie?" (June 27, 2018), *TVO Today*, accessed online: http://www.tvo.org/article/ontarios-hottest-hot-spot-for-foreign-owned-homes-is-fort-erie
5 See Canadian Press, "75% of Americans who owns Canadian recreational properties made purchase after foreign buyer ban: survey" (November 29, 2022), accessed online: https://www.cp24.com/news/75-of-americans-who-owns-canadian-recreational-properties-made-purchase-after-foreign-buyer-ban-survey-1.6173678 where the authors cite a report from Royal LePage indicating that out of 1,506 U.S.
[6] *Ibid*.
[7] Statistics Canada, "Canadian Housing Statistics Program" (2020), accessed online: https://www.statcan.gc.ca/en/subjects-start/housing.
[8] Better Dwelling, "Foreign Buyers Own 1 in 10 Recently Built Condos in Canada, 1 in 20 Homes in Total" (January 8, 2022), accessed online: https://betterdwelling.com/foreign-buyers-own-1-in-10-recently-built-condos-in-canada-1-in-20-homes-in-total/

to their share of the population. In Ontario, 57.1 per cent of non-resident owners in 2020 were over the age of 55.[9]

III. ANALYZING THE LEGISLATIVE GAPS

Section 86 of the Substitute Decisions Act

Given that the legislation currently prescribes no jurisdictions, section 86 appears to be of limited use in addressing contentious guardianship appointments which involve orders from outside of Canada. While section 86 allows for any guardianship order made in Canada to be resealed, it appears to be completely ineffective with respect to an order made elsewhere. Without a list of prescribed jurisdictions or criteria to be applied in an application to reseal a foreign guardianship order, the *SDA* effectively provides no mechanism whatsoever for the recognition of a non-Canadian order.

While there are two known reported cases where section 86 has been examined,[10] only one of those cases deals with the resealing of a guardianship order from outside of Canada. Despite holding that section 86 did not apply on the facts of the case, the 2013 decision of *Cariello v. Perrella*, provides a thorough overview of the legislative gap inherent in section 86 of the *SDA*.

Cariello v Father Perrella

In *Cariello v Father Perrella*,[11] an application to reseal a foreign guardianship order under section 86 of the SDA was unsuccessful.

Father Michele Perrella immigrated to Canada from Italy in 1969. Despite attaining Canadian citizenship, Father Perrella remained an Italian citizen and in 2001, returned to Italy where he executed a Consular Declaration stating that his return was intended to be permanent.[12] By 2010 he was officially registered as an Italian citizen living in Italy.[13]

---

[9] Joshua Gordon and Joanie Fontaine, "A profile of residential real estate investors in 2020" (May 23, 2023), *Statistics Canada*, accessed online: http://www.150.statcan.gc.ca/n1/pub/46-28-0001/2023001/article/00002-eng.htm
[10] See *Re Durity Estate*, 1996 CarswellOnt 5933 (Ont. Gen. Div.) [*Re Durity*]; *Cariello v. Perrella*, 2013 ONSC 7605 (Ont. S.C.J.).
[11] 2013 ONSC 7605 [*Cariello*].
[12] *Cariello*, *supra* at para 9.
[13] *Ibid.,* at para 10.

A year later, Father Perrella flew to Toronto for a temporary visit. Unfortunately, he suffered a medical incident during his stay which led to a decline in his cognitive function.[14] As a result, Father Perrella refused to board his return flight home and was placed in a long-term care facility in Toronto where it was determined that he exhibited signs of advanced dementia.[15]

Father Perrella purportedly executed POA documents which appointed two of his long-time friends in Toronto.[16] In the meantime, Father Perrella's brother brought an application for guardianship appointment in Italy. The Italian court appointed a lawyer, Maria Cariello as his interim guardian.[17] Ms. Cariello traveled to Toronto for the purpose of asking the Ontario Superior Court to reseal the Italian guardianship order, or at least set aside the purported POAs.[18] The long-time friends agreed that the POAs should be set aside, but asked the court to order that one of them be appointed his guardian of property and person.[19] Justice Mesbur determined that the court could not reseal the Italian guardianship and that Father Perrella's purported POAs were likely invalid.

Where it concerned Justice Mesbur's conclusion on the court's inability to reseal the Italian order, Her Honour held that because the Ontario government had not made Italy a prescribed jurisdiction for the purposes of section 86, the court had no authority to reseal the order. Justice Mesbur summarized this conclusion as follows:

> 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.[20]

[14] *Ibid*., at para 15.
[15] *Ibid*., at paras 23-24.
[16] *Ibid*., at para 21.
[17] *Ibid*., at para 39.
[18] *Ibid*., at para 40.
[19] *Ibid*., at para 48.
[20] *Ibid*.

With respect to the question of whether the Ontario court had jurisdiction to appoint a guardian for Father Perrella, Justice Mesbur noted that neither Canada, nor Italy, had implemented the *Hague Convention on the International Protection of Adults*.[21] Without an international agreement in place to govern the issue of jurisdiction, Her Honour turned to the general conflict of law rules with respect to "matters of a person's status," including capacity.

This analysis turned on the question of where Father Perrella was domiciled as those laws were in fact, the determining factor in this sort of matter. Although Father Perrella has previously made Ontario his domicile, it was determined that at the time of his incapacity, he was domiciled in Italy. The evidence demonstrated his clear intention to permanently remain in Italy. This included his registration as an Italian resident, and the fact that the majority of his assets and family members were in Italy.

It was the view of Justice Mesbur that "since Fr. Perrella is domiciled in Italy it is the Italian court that must take the jurisdiction to determine his capacity and ancillary matters arising from that determination."[22]

Despite Her Honour declining to reseal the Italian guardianship order, the court ultimately recognized Ms. Cariello's authority to make decisions with respect to Father Perrella's property and personal care. Rather than relying on section 86 of the *SDA*, Justice Mesbur reasoned that Ms. Cariello's authority could be recognized because Father Perrella had no valid substitute decision-making arrangement in Ontario and the Ontario court declined jurisdiction with respect to his capacity, deferring jurisdiction to the Italian court that appointed Ms. Cariello.[23]

At first glance, the *Cariello* decision is potentially confusing. While the specific application under section 86 of the SDA was unsuccessful, the court still delivered the applicant's desired outcome. This was due to the particular facts of the case which surrounded an incapable person who resided outside of Ontario who was clearly visiting the province on a temporary basis when a medical incident rendered him incapable.

[21] *Ibid*., at para 51.
[22] *Ibid*., at para 77.
[23] *Ibid*., at paras 85-87.

It is highly plausible that a similar situation may negatively impact a person whose domicile is not so easily established outside of Ontario, and the Ontario court in that situation finds that it does have jurisdiction with respect to that person's capacity. In such a situation, the gaps in section 86 could easily prevent the foreign order from having any effect in Ontario. This may result in the need for a new order, or even a conflicting order like the one sought by the respondents in *Cariello*. The fact that the situation resolved itself in *Cariello* does not eliminate the broader problem.

If the government of Ontario had intended to permit resealing of guardianship orders from outside of Canada, it could have provided for same in the regulations. It would likely be best if the legislature, rather than the courts, undertake to resolve the issue of the recognition of foreign guardianship orders.

Academic Insights on the Ineffectiveness of s 86

In 2005, the British Columbia Law Institute ("**BCLI**") prepared a report on the recognition of adult guardianship orders from outside the province. The report highlights how "[t]he increasing mobility of persons and wealth makes it inevitable that from time to time issues will arise concerning adult guardianship orders made outside the province, the extent to which they should be given effect, and the machinery for doing so."[24]

With respect to non-Canadian orders, the report recommends a confirmation procedure along the lines of one that currently exists for the 'resealing' of foreign probate orders. The BCLI report also offers insight into the choice to prescribe jurisdictions, noting that "[g]iven the degree of judicial oversight embodied in the resealing procedure we do not believe the concept of 'prescribed jurisdictions' serves a useful purpose and would abandon it."[25]

IV. LEGISLATION IN OTHER CANADIAN PROVINCES

There are four Canadian provinces and territories which have legislation in place that Ontario can look to in its evaluation of section 86 of the *SDA*: Yukon, Saskatchewan, Nova Scotia and the Northwest Territories. Yukon offers the most straightforward and

[24] "British Columbia Law Institute Report on the Recognition of Adult Guardianship Orders from outside the Province" (2005) 31:3 Commw L Bull 129 at 134 [BCLI].
[25] BCLI, *supra* at 141.

simple solution: a list of prescribed jurisdictions. The other three, however, have developed additional criterion for resealing a foreign guardianship order.

Yukon's Approach

The Yukon Territory takes a similar approach to Ontario's legislation; however, its government has prescribed a list of jurisdictions in which a foreign guardianship order can be resealed.

Section 56 of Yukon's *Adult Protection and Decision-Making Act*[26] provides the following:

> **56 Orders from outside Yukon**
>
> (1) In this section, "foreign order" means an order of a court made outside Yukon that appoints a person to carry out duties comparable to those of a guardian.
>
> (2) Any person may apply to the Supreme Court for an order resealing a foreign order that was made
>
> (a) in a province or territory of Canada; or
>
> (b) in a jurisdiction outside Canada prescribed by the regulations.
>
> (3) The Supreme Court may order the foreign order to be resealed if the applicant files with the court
>
> (a) a copy of the foreign order bearing the seal of the court that made it or a copy of the foreign order certified by the registrar or other officer of the court that made it; and
>
> (b) a certificate signed by the registrar or other officer of the court that made the foreign order stating that the order has not been revoked and is of full effect.
>
> (4) A foreign order that has been resealed
>
> (a) has the same effect in Yukon as if it were an order made under this Act appointing a guardian;
>
> (b) is subject in Yukon to any condition imposed by the Supreme Court that the Supreme Court may impose under this Act on an order appointing a guardian; and
>
> (c) is subject in Yukon to the provisions of this Act respecting guardians.

Pursuant to subsection 56 (2)(b), Yukon's *Adult Protection and Decision-Making Act* provides that any person may apply to the Supreme Court of Yukon for an order resealing

[26] SY 2003, c 21, Sch A.

a foreign order that was made either in another Canadian province or territory or in a jurisdiction prescribed by the regulations.

Yukon's regulations are found in its *Adult Protection and Decision-Making Regulation*[27] which provide that for the purposes of subsection 56(2), a person may apply to the Supreme Court for an order resealing a foreign order that was made in Australia, Austria, Belgium, Denmark, Ireland, England, Finland, France, Germany, Iceland, Italy, The Netherlands, New Zealand, Northern Ireland, Norway, Portugal, Scotland, Spain, Sweden, Switzerland, any state of the United States of America, and Wales.[28]

While Yukon has taken the step to regulate select jurisdictions, the territorial government has not provided any rationale behind the jurisdictions selected nor have they provided a process for considering, evaluating, and adding new ones. By creating a fixed list, rather than a criterion for resealing, there is still a practical barrier in that some countries' guardianship orders are not recognized. This notable feature of Yukon's legislation begs the question of whether this regime actually closes the legislative gap that is experienced in Ontario. For example, it has been reported that many Canadians, especially those from the Mennonite community, frequently travel between Canada and Paraguay, a country that is not found on Yukon's prescribed list of jurisdictions.[29]

Saskatchewan's Approach

Saskatchewan features legislation which may actually provide a suitable solution to the problem faced in Ontario. Rather than prescribing a closed list of specific jurisdictions from which a guardianship order can be resealed, Saskatchewan has developed comprehensive criteria that can be effectively applied to a guardianship order from any jurisdiction.

[27] YOIC 2005/78.
[28] YOIC 2005/78 at s. 18.
[29] See Government of Canada, "Canada-Paraguay relations" (September 27, 2022), accessed online: https://www.international.gc.ca/country-pays/paraguay/relations.aspx?lang=eng where it is reported that "Canada and Paraguay have a robust bilateral relationship, reinforced by strong people-to-people ties. This is reflected in the 15,000 to 20,000 Canadians in Paraguay, most of them members of the Mennonite community.

Pursuant to section 65.1 of Saskatchewan's *The Adult Guardianship and Co-decision-making Act*,[30] an applicant for resealing is required to:

> (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.[31]

As part of the resealing application, Saskatchewan requires applicants to serve a copy of the application upon the following parties:[32]

> (a) the adult;
>
> (b) the nearest relatives within the meaning of section 5, 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;

[30] SS 2000, c A-5.3 [*AGCA*].
[31] *AGCA*, *supra* at s 65.1.
[32] Pursuant to subsection 65.3(3), if the court considers it appropriate to do so, the court may dispense with service on all or any of the persons mentioned in clauses (1)(a) to (j).

(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.

A court in Saskatchewan may also require a guardian to file one or more bonds, in the prescribed form, with the local registrar of the court. If the court requires a bond to be filed, the court shall then determine the amount of that bond. As part of the application process, no bond will be required if the value of the adult's estate does not exceed the prescribed amount or a certificate is produced from an officer of the foreign court, stating that security in a sufficient amount has been given in the foreign jurisdiction.[33]

On an application for resealing and after any hearing that the court considers necessary, Saskatchewan's legislation also allows for the court to determine whether it is in the best interests of the adult to require a review of the resealed foreign order and, if required, specify the period within which the review is to take place.[34]

Saskatchewan's criterion is ultimately useful because of its flexibility and simplicity. The process is not onerous and appears to allow for a straightforward application on resealing. Rather than a closed list of jurisdictions which is only applicable to the countries selected, this criterion can be applied to nearly any valid guardianship order from any foreign jurisdiction.

Nova Scotia's Approach

Nova Scotia, through its *Adult Capacity and Decision-making Act*,[35] takes a similar approach to Saskatchewan. Notably, the legislation in Nova Scotia also carries the requirement that if the guardianship is with respect to property, the applicant must provide an inventory of the incapable person's property. The inventory of property that is situated within the province must then be provided to the courts and updated as necessary.

[33] *AGCA*, *supra* at s 65.2.
[34] *Ibid*., at s 65.1(6).
[35] SNS 2017, c 4 [*ACDA*].

Nova Scotia also provides the court with the discretion to require the applicant to account or report, and apply for a review of the order. However, subsection 4 (b) of the *ACDA* provides that the court may impose any terms, conditions or limits on the order as the court considers appropriate.

Similar to Saskatchewan, a court in Nova Scotia may not reseal a foreign guardianship order until it has received a certificate from an officer of the foreign court confirming that the order is in effect and until the court has received any necessary bond. A bond may not be necessary in Nova Scotia if the court receives a certificate from an officer of the foreign court stating that security in a sufficient amount has been provided there.[36]

The Northwest Territories' Approach

Similar to legislation in Saskatchewan and Nova Scotia, the Northwest Territories' legislation provides a list of parties who must be served a copy of the application and requires the applicant to produce a valid certificate from the court in the foreign jurisdiction.

Pursuant to subsection 15(3)(a) of the *Guardianship and Trusteeship Act*,[37] the Northwest Territories provides the court with the discretion to make any conditions, restrictions, modifications or additions that the court may impose or make in resealing a foreign guardianship order. The *Act* also provides that where the court makes an order under subsection 15(3), the court shall specify the time within which the resealed order must be reviewed by the Court. That time must not extend past the earlier of the date provided for review by the terms of the resealed order or the date for review required by the *Act* (although the *Act* itself does not prescribe any required time limits for review).[38]

V. THE ENFORCEMENT OF NON-MONETARY JUDGMENTS

Barring legislative amendments to close the gap in section 86, it is plausible a creative litigant will eventually resort to a novel solution. This includes the enforcement of a foreign non-monetary order pursuant to the real and substantial connection test which was first

[36] *ACDA*, *supra* at s 65.
[37] SNWT 1994, c 29 [*GTA*].
[38] *GTA*, *supra* s 15(5).

adopted by the SCC in *Morguard Investments Ltd v De Savoye*[39] and further expanded by the Court in *Pro Swing Inc v Elta Golf Inc*.[40] The following will take a closer look at these proposed solutions.

While there has not been a representative case on resealing a foreign guardianship order to date, the SCC has developed a test which allows courts to recognize judgments in one province which were ultimately made in another. That test which developed under the context of the enforcement of monetary judgments, has since been expanded to also recognize the enforcement of non-monetary judgments. Under this test, it is arguable that a litigant could bring a foreign guardianship order before an Ontario court for the purpose of enforcing or resealing the order pursuant to the caselaw that has developed. In fact, as will be discussed, in 2020 the Ontario Superior Court of Justice partially recognized an order of the Supreme Court of the State of New York in a temporary guardianship application in Ontario.

In *Morguard*,[41] the SCC established the "real and substantial" connection test with respect to whether the courts of one province should recognize judgments made in other provinces. The *Morguard* decision dealt with an attempt to enforce a monetary judgment of an Alberta court in British Columbia.

In a case comment published in the Advocates' Quarterly, Black and Swan articulate how the decision in *Morguard* leaves a practical question unanswered: the appropriate enforcement regime for truly foreign judgments. The authors note that within the *Morguard* decision, the SCC recognizes that the world has changed since the enforcement rules described were developed in 19th century England and that "[a]ccommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal."[42] Black and Swan conclude their

[39] 1990 CanLII 29 (SCC), [1990] 3 SCR 1077 [*Morguard*].
[40] 2006 SCC 52 (CanLII), [2006] 2 SCR 612 [*Pro Swing Inc.*].
[41] *Morguard*, *supra*.
[42] *Morguard*, *supra* at p 234.

case comment by opining that "there would, however, be little practical difficulty in extending the *Morguard* test to cover judgments of the courts of other countries."[43]

In 2003, the test was expanded by the SCC in *Beals v Saldanha*[44] to apply to judgments made by courts outside of Canada. In that decision, it was recognized that the law needed to adapt to the increasing movement of people across borders.

However, these decisions stand for the proposition that the real and substantial connection test can be applied to monetary judgments made by courts in other provinces and other jurisdictions outside Canada.

Where it concerns non-monetary judgments, the 2006 SCC decision in *Pro Swing Inc v Elta Golf Inc*.[45] further extended the real and substantial test to apply to non-monetary judgments, albeit with some caution. In that decision, the majority carefully stated that, "courts must be cautious to preserve their nation's values and protect its people."[46]

In *The Bank of Nova Scotia Trust Company v. Pernica*,[47] the court recognized an order of the Supreme Court of the State of New York. However, the Ontario court limited the effect of the order as it related to providing funds to the incapable person's temporary guardian for the purpose of providing adequate care.

On July 10, 2019, the Supreme Court of the State of New York made an order which appointed Ms. Mock as temporary guardian of Ms. Ida Rubin with broad powers to investigate her whereabouts and return her to New York. The court found it was in Ida's best interest and for her personal safety to have a temporary guardian appointed forthwith. Ms. Mock was attempting to obtain the funds ordered in the July 10 order from Scotiabank, the trustee of the $100 million spousal trust for Ida. Scotiabank was ordered by the court to pay funds for Ida's well-being and authorized by his honour to pay up to

[43] Vaughan Black & John Swan, "New Rules for the Enforcement of Foreign Judgments: Morguard Investments Ltd. v. De Savoye" (1991) 12:4 Advoc Q 489 at 507 [Black & Swan].
[44] 2003 SCC 72 (CanLII), [2003] 3 SCR 416 [*Beals*].
[45] *Pro Swing Inc.*, *supra*.
[46] Ibid., at para 64.
[47] 2020 ONSC 67 [*Pernica*].

$250,000. Two of Ida's adult children challenged the recognition of the July 10 order in the Ontario Superior Court of Justice. Scotiabank brought its own application.

The court in Ontario found the order to be broad and only focused on the portions to be performed in Ontario. These portions included the payment of money by Scotia and the ability for Ms. Mock to access Ida's medical and confidential records in Ontario.[48]

The court held that the test for recognizing a foreign judgment is clear: pursuant to *Pro-Swing*, the court must ask whether the New York Court had jurisdiction to make the order. In this case, Justice Conway concluded that the answer was yes.[49] Next, the court had to determine whether the order was final, holding that pursuant to *ProSwing* at para. 94, "the concept of final does not mean the order must be the final step in the proceeding."[50] The issue to be determined by the court concerned whether the order could not be varied or abrogated, regardless of whether under appeal.[51]

The court concluded that the order requiring Scotia to pay the temporary guardian is clear, final and easily administered by the court. [52] Her honour held that there was no merit to the defences to the recognition of the order and that there was nothing to substantiate fraud or denial of natural justice in the New York proceeding or public policy.

Ultimately, the order in *Pernica* was recognized but only to the extent that it related to Scotia's funding of Ms. Mock (the temporary guardian) and the funding of legal counsel. The court did not, however, recognize provisions of the order which granted the temporary guardian with the right to seek the medical and confidential information of Ida.

If the government of Ontario does not elect to make changes to fill the gap in s 86 of the *SDA*, it is very possible that more litigants may eventually explore the novel option of

---

[48] *Pernica*, *supra* paras. 8-9.
[49] Ida was in New York when the guardianship application was started. Lawyers were representing Ida in the proceedings. The New York court had traditional presence-based jurisdiction. Ida had been living in New York with her daughter for some time so there was no issue that a real and substantial connection existed.
[50] *Pernica*, *supra* at para. 5.
[51] See *Continental Casualty Company v. Symons*, 2015 ONSC 6394, at para 36 citing the *Four Embarcadero Venture v. Kalen*, 1988 CanLII 4828 (ON SC), 1988 CarswellOnt 412.
[52] Justice Conway held it was final due to expert evidence provided, the fact that the order made a conclusive determination that Ida needed to have a temporary guardian, the fact that the order is clear and direct that Scotia is to make payments to the temporary guardian, and the fact that Ida's guardianship requirements may change is inherent in any guardianship order.

attempting to enforce a non-monetary judgment in an application for the resealing of a foreign guardianship order, much like the applicants did in the *Pernica* decision.

VI. CONCLUSION

It remains to be seen how Ontario will address the gap in s.86 of the SDA. It is hoped that credence will be given to existing legislation already available in Saskatchewan, Nova Scotia, and the Northwest Territories to create a mechanism that will address these issues.