



INDEX OF MATERIALS

PREPARED FOR STEP CANADA-USA CONFERENCE CHICAGO

October 6-8, 2024

Kimberly A. Whaley & Oliver O'Brien (Student-at-Law)

WHALEY ESTATE LITIGATION PARTNERS (WEL PARTNERS)

www.welpartners.com

MATERIAL	PAGE
Paper - Recognition of Powers of Attorney and Guardianship Orders in Ontario, Florida and New York by Kimberly A. Whaley and Oliver O'Brien (Student-at-Law)	3 - 24
Table – Recognition of Powers of Attorney / Health Care Directives across Canada	25 - 29
Table – Recognition of Guardianship Orders across Canada	30 - 33
Paper - Resealing Foreign Guardianship Orders in Ontario: <i>Prescribing a Solution to the Legislative Gap</i> by Bryan Gilmartin and Brett Book	34 - 55
PowerPoint – Incapacity Planning (October 8, 2024 – Plenary Session)	56 - 68



**RECOGNITION OF POWERS OF ATTORNEY AND GUARDIANSHIP ORDERS IN
ONTARIO, FLORIDA, AND NEW YORK**

STEP CANADA-USA CONFERENCE CHICAGO

October 6-8, 2024

**Kimberly A. Whaley & Oliver O'Brien (Student-at-Law)
WHALEY ESTATE LITIGATION PARTNERS (WEL PARTNERS)**

www.welpartners.com

CONTENTS

I. INTRODUCTION..... 1

II. DEMOGRAPHIC SHIFTS AND PROPERTY OWNERSHIP..... 1

FOREIGN OWNERSHIP IN CANADA AND THE UNITED STATES OF AMERICA..... 1

AGEING POPULATION IN CANADA AND THE UNITED STATES OF AMERICA 2

III. RECOGNITION OF FOREIGN POWERS OF ATTORNEY AND GUARDIANSHIP ORDERS..... 3

ONTARIO..... 3

UNITED STATES OF AMERICA UNIFORM LEGISLATION..... 8

FLORIDA..... 10

NEW YORK..... 13

IV. APPLICATION OF THE LAWS IN ONTARIO, FLORIDA, AND NEW YORK..... 15

SCENARIO #1 – MR. BLAKE LIVES IN FLORIDA WITH ONTARIO POWERS OF ATTORNEY/ GUARDIANSHIP 16

SCENARIO #2 – MR. BLAKE LIVES IN ONTARIO WITH FLORIDA POWERS OF ATTORNEY/ GUARDIANSHIP 18

V. CONCLUDING COMMENTS..... 20

I. INTRODUCTION

In modern day society, people and their property have become increasingly mobile. As a result, it is more common for individuals to own property, live, and operate within multiple jurisdictions. Canadians, often referred to as ‘snowbirds’ are an example of these circumstances, living in Canada during the more temperate months and escaping to Florida’s warmer climate during the winter. This trend is most often seen amongst older adults, especially those who have retired from the workforce. This too, against the backdrop of demographic shifts in both Canada and the United States of America (the “U.S.A.”), where populations are experiencing increased longevity and consequently, associated increase in illnesses involving cognitive decline and vulnerability.

These factors have led to an increased need for a compatible interjurisdictional approach to substitute and/or supported decision-making. If one considers a situation where a Canadian owns property both in Canada, and in the U.S.A., and has Canadian Powers of Attorney only, and becomes incapacitated - will their Power of Attorney documents be enforceable in the U.S.A.? Further still, what is to be done if no Powers of Attorney exist, but instead, there is need for a Guardianship Order?

The answer to these questions is complex. Both Canada and the U.S.A. are federalised with no uniformity of legal application across jurisdictions. We will examine the different regimes in Ontario, Florida, and New York, with specific reference to the recognition of foreign Powers of Attorney, Advance Health Directives and Guardianship Orders. We will also review proposed uniform legislation through the Uniform Law Commission.

II. DEMOGRAPHIC SHIFTS AND PROPERTY OWNERSHIP

Foreign Ownership in Canada and the United States of America

Research indicates that a significant number of people own property in both Canada and the U.S.A. In Canada, ownership of property by non-Canadian owners often involves holding multiple properties, some in multiple Canadian jurisdictions. In 2020, approximately 3.5 per cent of homeowners in Canada were non-resident, representing roughly 340,735 owners. 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-residents purchasing residential property.¹ Notably, recreational property such as cabins, cottages, and other vacation homes have been exempted from the prohibition.²

In 2020, there were 187,325 non-resident homeowners in Ontario, 19,120 (10.2 per cent) of whom owned multiple properties.³ Where it concerns the ownership of condominiums, non-residents accounted for 6.5 per cent of all purchases in 2020.⁴ Of these non-residents, persons aged 55 and older were overrepresented among homeowners relative to their share of the population. In Ontario, 57.1 per cent of non-resident owners in 2020 were over the age of 55.⁵

Canadians represent one of the largest of foreign investor groups in U.S.A. real estate, with a total value in or around \$5.5 billion USD in 2022. An estimated 45% of all American property purchased by Canadians is in Florida.⁶ Approximately 58% of Canadian buyers purchased an American property as a vacation home, 16% as a primary residence, 16% as rental properties, and 3% for student use.

Ageing population in Canada and the United States of America

In Canada and the U.S.A., current and evolving statistics confirm that our respective populations continue to age rapidly. Both countries are older than they have ever been. In 2020, the proportion of Americans aged 65 or older reached 55.8 million, or 16.8% of the total population. In Canada, this number was higher, equaling 19% of the countries'

¹ *Prohibition on the Purchase of Residential Property by Non-Canadians Act*, SC 2022, c 10, s 235.

² *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.

³ Statistics Canada, "Canadian Housing Statistics Program" (2020), accessed online: <https://www.statcan.gc.ca/en/subjects-start/housing>.

⁴ 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/>

⁵ 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>

⁶ Michele Lawrie, Home Abroad, "Canadians Investing Big in Homes in the USA" (April 3, 2023), accessed online: <https://homeabroadinc.com/statistics-canadians-investing-in-us-real-estate/>

population.⁷ The United States Census Bureau has predicted that by 2050, there will be a 47% increase in those 65 or older, rising to 23%.

With longevity can come an increase in the occurrence of medical issues affecting executive functioning in the brain. Certain diseases and disorders, such as dementia in varying types and degrees, delirium, delusional disorders, Alzheimer's, related cognitive disorders and other conditions involving reduced functioning and capability, also can become more prevalent with age and longevity. There are a wide variety of disorders that may affect decisional capacity and in turn, increase an individual's susceptibility to becoming vulnerable and dependent. A study conducted by Columbia University in New York found that almost 10% of Americans over 65 had dementia, with a further 22% having some form of mild cognitive impairment.⁸ Likewise, Statistics Canada found that approximately 750,000 Canadians suffer from dementia, equating to just over 10% of Canadians over 65.⁹

The statistical likelihood of some form of cognitive impairment has led to increased awareness of the need for future planning for illness and incapacity. So, what then, is available at law to assist in the reciprocation and enforcement of Powers of Attorney, Advance Health Directives, or in the alternative, Guardianship Orders?

III. RECOGNITION OF FOREIGN POWERS OF ATTORNEY AND GUARDIANSHIP ORDERS

ONTARIO

Powers of Attorney: In Ontario, Powers of Attorney for capacity planning purposes are primarily governed by the *Substitute Decisions Act* (the "**SDA**").¹⁰ The *SDA* imposes the requirements for the drafting and execution of Powers of Attorney, codifies some of the

⁷ Zoe Caplan, "2020 census: 1 in 6 People in the United States Were 65 and Over" (May 25, 2023), *United States Census Bureau*, accessed online: <https://www.census.gov/library/stories/2023/05/2020-census-united-states-older-population-grew.html>

⁸ *Estimating the Prevalence of Dementia and Mild Cognitive Impairment in the US: The 2016 Health and Retirement Study Harmonized Cognitive Assessment Protocol Project*

⁹ <https://www.statcan.gc.ca/o1/en/plus/5374-alzheimers-awareness-month>

¹⁰ S.O. 1992, c 30 [*SDA*].

core duties and obligations of an Attorney and facilitates the recognition of Powers of Attorney from foreign jurisdictions.

In Ontario, three types of Power of Attorney exist:

- A Continuing Power of Attorney for Property under the *SDA* (“**CPOAP**”);
- A Power of Attorney for Personal Care under the *SDA* (“**POAPC**”); and
- A General Power of Attorney under the *Powers of Attorney Act*.¹¹

We only address Powers of Attorney under the *SDA* within. As the language indicates, a CPOAP permits a substitute decision maker to make decisions regarding a grantor’s property. A POAPC is concerned with making substitute decisions for a grantor in the following categories: shelter, clothing, hygiene, safety as well health care, which includes treatment decisions.¹²

A CPOAP drafted in accordance with the *SDA* survives the mental incapacity of the grantor/donor. The CPOAP must be called a “Continuing Power of Attorney,” or, state that it gives the attorney the power to continue acting for the grantor should the grantor become incapable.¹³ The CPOAP is effective immediately upon execution unless there is a provision, or triggering event set out in the powers granted which must be complied with.

The execution requirements for a CPOAP are found in section 10 of the *SDA* and require that: the grantor execute the document in the presence of two witnesses, who shall sign the Power of Attorney document at the same time together.¹⁴ The witnesses cannot include certain people such as: the attorney, or attorney’s spouse, the grantor’s spouse or partner, or a child of the grantor.¹⁵

A POAPC is only effective upon a determination of incapacity under Ontario’s *Health Care Consent Act*,¹⁶ or incapacity under the *SDA* (usually a finding made by a treating medical

¹¹ R.S.O. 1990, c. P.20

¹² *SDA*, s. 45.

¹³ *SDA*, s.7.

¹⁴ *SDA*, s.10(1).

¹⁵ *SDA*, s.10(2).

¹⁶ 1996, S.O. 1996, c. 2, Sched. A.

professional looking for consent to a course of treatment). The formalities required for a valid POAPC are found in section 48 of the *SDA* and require that: the grantor execute the document, and be witnessed by two persons.¹⁷ Neither an attorney, nor the spouse or partner of an appointed attorney, or any person listed under section 10(2) of the *SDA* can be a witness.

A valid Power of Attorney in Ontario is also dependent on the grantor having the requisite decisional capacity to grant. The relevant legal criteria required for the capacity to grant Powers of Attorney for Property, and Personal Care, are found in sections 8(1),¹⁸ and 47(1),¹⁹ respectively, under the *SDA*.

The *SDA* provides for the recognition of Powers of Attorney executed outside of the province. This applies to both Powers of Attorney for Property and Personal Care. Section 85 provides as follows:

Conflict of laws, formalities

85 (1) As regards the manner and formalities of executing a continuing power of attorney or power of attorney for personal care, the power of attorney is valid if at the time of its execution it complied with the internal law of the place where,

- (a) the power of attorney was executed;
- (b) the grantor was then domiciled; or

¹⁷ *SDA*, s.48(1).

¹⁸ *SDA*, s.8 (1) A person is capable of giving a continuing power of attorney if he or she,

- (a) knows what kind of property he or she has and its approximate value;
- (b) is aware of obligations owed to his or her dependants;
- (c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
- (d) knows that the attorney must account for his or her dealings with the person's property;
- (e) knows that he or she may, if capable, revoke the continuing power of attorney;
- (f) appreciates that unless the attorney manages the property prudently its value may decline; and
- (g) appreciates the possibility that the attorney could misuse the authority given to him or her. 1992, c. 30, s. 8 (1).

¹⁹ *SDA*, s.47 (1) A person is capable of giving a power of attorney for personal care if the person,

- (a) has the ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
- (b) appreciates that the person may need to have the proposed attorney make decisions for the person. 1992, c. 30, s. 47 (1).

(c) the grantor then had his or her habitual residence.²⁰

In other words, a foreign Power of Attorney is valid in Ontario if it is valid in either the jurisdiction where it was executed, or the jurisdiction where the grantor lived.²¹ The same rules apply to the revocation of a Power of Attorney.²² Section 85 does not allow for the complete reciprocal enforcement of foreign law with respect to a validly executed Power of Attorney, since it includes the following qualifiers:

Legal requirements outside Ontario

(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.²³

Alteration in law

(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.²⁴

Guardianship: in Ontario, Guardianship is also governed by the *SDA*, which contains provisions for the recognition of guardianship orders made outside of the province.

Section 86 of the *SDA* defines a 'foreign order' as "an order made by a court outside Ontario that appoints, for a person who is sixteen years of age or older, a person having

²⁰ *SDA*, s.85(1).

²¹ 'Domicile' refers to the place where a person permanently has their home and does not equate to residency or citizenship. While a person may be a citizen or resident of several jurisdictions, a person can only have one domicile.

²² *SDA*, s.12 and s.53 provide that a prior CPOAP / POAPC is revoked unless the document specifically provides that the grantor shall have multiple Powers of Attorney. This provision can allow for documents in multiple jurisdictions.

²³ *SDA*, s.85(4).

²⁴ *SDA*, s.85(5).

duties comparable to those of a guardian of property or guardian of the person”.²⁵ Section 86(2) holds that an order of this nature can be resealed on an application to the court:

Resealing

(2) Any person may apply to the court for an order resealing a foreign order that was made in a province or territory of Canada or in a prescribed jurisdiction.²⁶

Subsection 86(4) of the *SDA*, provides as follows:

Effect of resealing

(4) A foreign order that has been resealed,

(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.²⁷

An application for the resealing of a foreign guardianship order 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.²⁸

Despite the *SDA* allowing for relatively easy recognition of Powers of Attorney and Guardianship Orders from other Canadian provinces, it features substantial gaps where it concerns guardianship orders from outside of Canada. The problem with section 86 lies in the fact that Ontario has yet to prescribe any qualifying jurisdictions, even though section 90(g) of the *SDA* authorizes the Lieutenant Governor in Council to exercise the power to do so.

²⁵ *SDA*, s.86(1).

²⁶ *SDA*, s.82(6). [emphasis added]

²⁷ *SDA*, s.86(4).

²⁸ *SDA*, s.86(3).

Accordingly, there is currently no mechanism for a court in Ontario to recognise a guardianship order made outside of Canada. This legislative gap is discussed in further detail below, in section IV.

UNITED STATES' UNIFORM LEGISLATION

The Uniform Power of Attorney Act

As of July 2024, 32 American states have enacted the most current form of the Uniform Law Commission's, '*Uniform Power of Attorney Act*' ("**UPOAA**") which originated in 2006.²⁹ The UPOAA concerns CPOAPs and prescribes that Powers of Attorney are continuing by default.

The UPOAA permits the recognition of foreign CPOAPs.³⁰ Notably, New York, and Florida, have not enacted the UPOAA and instead utilise their own legislation respecting Powers of Attorney.³¹

The Uniform Health Care Decisions Act

In most of the U.S.A., substitute decision making where it concerns health care is carried out using 'Advance Directives,' or 'Advance Health Care Directives'. These documents typically include the naming of a substitute decision maker (known as a 'proxy' or 'surrogate') and include instructions about the grantor's medical care and any desired end-of-life decisions. Advance Directives are often referred to as 'living wills' and act in much the same way as a POAPC does in Ontario.

Advance Directives are creatures of American state law and consequently, statutes vary considerably in their scope, formality requirements, and definitions. For this reason, the Uniform Law Commission has a uniform act for health powers of representation under

²⁹ For more information on the *UPOAA*, see the Uniform Law Commission, accessible at <https://www.uniformlaws.org/committees/community-home?communitykey=b1975254-8370-4a7c-947f-e5af0d6cb07c>

³⁰ *UPOAA*, s.107.

³¹ The following American states and jurisdictions have enacted the *UPOAA*: Alabama, Arkansas, Colorado, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Iowa, Kentucky, Maine, Maryland, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

'the Uniform Health Care Decisions Act' ("**UHCDA**").³² The UHCDA is in the early stages of implementation in the U.S.A., and as of July 2024, the only jurisdictions to have introduced this act into their state legislatures are Nebraska, and Delaware.

The UHCDA provides for the recognition of Advance Directives made in other American states. Section 16 states that an Advance Directive created outside the state is valid, "if it complies with the law of the state specified in the directive or, if a state is not specified, the state in which the individual created the directive". It does not, however, provide for the recognition of Advance Directives/POAPCs from outside the U.S.A.

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

In the U.S.A., 46 states have enacted a version of the Uniform Law Commission's, *'Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act'* (the "**AGPPJA**")³³. This act is specifically focused on the jurisdictional issues concerning Guardianships and Conservatorships. Four states have yet to enact the AGPPJA: Michigan, Kansas, Texas and Florida.

The AGPPJA provides a flexible approach for American courts recognizing guardianship orders made in other states and foreign jurisdictions. To the extent the foreign order does not violate the fundamental principles of human rights, a state court may, in its discretion, recognize an order entered in another country to the same extent as if it were an order entered in another American state. Section 103 of the AGPPJA states:

A court of this state may treat a foreign country as if it were a state for the purpose of applying this Article and Articles 2, 3, and 5.

Consequently, an American court may conclude that the court in the foreign country has jurisdiction because it constitutes the respondent's, "home state," or "significant-connection state". Section 401 of the AGPPJA authorises a guardian or conservator to register an order as a foreign judgment in the desired state:

³² For more information on the *UHCDA*, see the Uniform Law Commission, accessible at <https://www.uniformlaws.org/committees/community-home?CommunityKey=3df274d6-776b-4780-8e4e-018a850ef44e>

³³ For more information on the *AGPPJA*, see the Uniform Law Commission, accessible at <https://www.uniformlaws.org/committees/community-home?CommunityKey=0f25ccb8-43ce-4df5-a856-e6585698197a>

If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in this state, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in this state by filing as a foreign judgment in a court, in any appropriate county of this state, certified copies of the order and letters of office.

The fact that a Guardianship order of a foreign country cannot be enforced pursuant to the registration procedures of Article 4 does not preclude enforcement by the court under some other provision, or rule of law, specifically those found in state legislation. Once registered in the US state, the following applies under section 403 of the AGPPJA:

(a) Upon registration of a guardianship or protective order from another state, the guardian or conservator may exercise in this state all powers authorized in the order of appointment except as prohibited under the laws of this state, including maintaining actions and proceedings in this state and, if the guardian or conservator is not a resident of this state, subject to any conditions imposed upon nonresident parties.

(b) A court of this state may grant any relief available under this [act] and other law of this state to enforce a registered order.

FLORIDA

Advance Directives: In Florida, the law concerning Advance Directives is found in Chapter 765 of the *Florida Statutes*.³⁴ An Advance Directive becomes effective upon the incapacity of the principal.³⁵ Nevertheless, there is an option under section 765.202 for the Advance Directive to become effective immediately upon execution.

The formalities for a valid Advance Directive are contained in section 765.202 and require that: the document be signed by the principal,³⁶ in the presence of two subscribing adult witnesses,³⁷ but the surrogate cannot be a witness, nor can the principal's spouse or blood relative.³⁸ The *Florida Statutes* does not provide a definition or test for determining

³⁴ Fla. Stat (2024)

³⁵ Fla. Stat (2024), s.765.204(2).

³⁶ Fla. Stat (2024) s.765.202(1).

³⁷ Ibid.

³⁸ Fla. Stat (2024), s.765.202(2).

the requisite capacity to execute an Advance Directive, but does define ‘incapacity’. ‘Incapacity’ is defined as when a person is “physically or mentally unable to communicate a willful and knowing health care decision”.³⁹

The *Florida Statutes* provide for the recognition of Advance Directives from other American states, but not from foreign jurisdictions. Section 765.112 provides as follows:

765.112 Recognition of advance directive executed in another state

An advance directive executed in another state in compliance with the law of that state or of this state is validly executed for the purposes of this chapter.

Florida is not currently a signatory to the UHCDA. It is of little consequence, however, given that section 16 of the *UHDCA* is largely similar to that found in the *Florida’s Statutes*. There is a legislated mechanism to recognise Advance Directives from other American states or territories, but not from foreign jurisdictions.

Powers of Attorney: CPOAPs are governed by Chapter 709 of the *Florida Statutes*. The default type of Power of Attorney is durable, or continuing, and is accordingly effective once executed by the principal.⁴⁰

The formalities for a valid Power of Attorney are found in section 709.2105 and require that: the agent be a natural adult person, or a financial institution with trust powers,⁴¹ the document be signed by the principal in the presence of two subscribing witnesses who must also sign,⁴² and the document must be acknowledged by the principal before a public notary.⁴³ The *Florida Statutes* do not define the requisite capacity to execute a Power of Attorney, but, defines the incapacity to manage property. ‘Incapacity’ in this context means, “the inability of an individual to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income”.⁴⁴

³⁹ Fla. Stat (2024), s.765.101(10)

⁴⁰ Fla. Stat (2024), s.709-2108(1) – subject to two exceptions under section 709.2108(2) (Powers of Attorney executed before October 1, 2011) and section 709.2106(4) (military Powers of Attorney).

⁴¹ Fla. Stat (2024), s.709.2105(1)

⁴² Fla. Stat (2024), s.709.2105(2)

⁴³ Ibid.

⁴⁴ Fla. Stat (2024), s.765.

Section 709.2106 identifies three different types of Power of Attorney in Florida:

- 1) Powers of Attorney executed in Florida or in accordance with Florida law before October 1, 2011;
- 2) Powers of Attorney executed in Florida or in accordance with Florida law after October 1, 2011; and
- 3) Powers of Attorney executed in another US state and not in accordance with the laws of Florida.

Accordingly, any Powers of Attorney made outside of Florida or an American state, must comply with Florida law to be used and recognised. The distinction in time between those before and after October 1, 2011, denotes a legislative change that occurred in Florida's Power of Attorney regime. Legislative changes included making the Power of Attorney Continuing or Durable by default in Florida.

Guardianship: Florida is one of four American states that has not agreed to, nor enforced the AGPPJA. The state has its own Guardianship legislation under Chapter 744 of the *Florida Statutes*.

Section 744.306 of the *Florida Statutes* enumerates the process for registration of a foreign guardianship when the incapable person becomes a resident of Florida. This section requires that the foreign guardian files the guardianship order with the clerk of the local county court of the incapable person within 60 days of their relocation to Florida. The language provides that, "such order shall be recognised and given full faith and credit" in the courts of Florida.⁴⁵

Section 744.307 permits a foreign guardian to manage property of a non-resident Ward. In this case, the guardian must file a petition demonstrating their appointment, describing the ward's property and estimated value and any liabilities in Florida. The guardian must then designate a 'resident agent' to act on their behalf in the state. The court will also determine if a foreign bond or other security is sufficient in the circumstances.⁴⁶

⁴⁵ Fla. Stat (2024), s.744.306(1).

⁴⁶ Fla. Stat (2024), s.744.307(1).

NEW YORK

Advance Directives: In New York, Advance Directives are governed by Chapter 45, Article 29-C of the *Consolidated Laws of New York* (hereinafter the “**Consolidated Statutes**”).⁴⁷

Advance Directives become effective on the incapacity of the principal.⁴⁸ The formalities required to execute a valid Advance Directive are found in section 2981 and provides that the principal must sign the document in the presence of two witnesses who must also sign.⁴⁹ The *Consolidated Statutes* do not define the requisite capacity to execute an Advance Directive but does define the capacity to make health care decisions. Capacity to make health care decisions means, “the ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of and alternatives to any proposed health care, and to reach an informed decision”.⁵⁰

New York legislation permits the recognition of foreign Advance Directives or similar such documents. Section 2990 provides as follows:

Proxies executed in other states

§2990. Proxies executed in other states. A health care proxy or similar instrument executed in another state or jurisdiction in compliance with the law of that state or jurisdiction shall be considered validly executed for purposes of this article.

Accordingly, for the foreign Advance Directive/POAPC to be recognised in New York, it must comply with the internal law of its originating jurisdiction. The foreign attorney must then act in accordance with the terms of the Power of Attorney document and the laws of New York.

Powers of Attorney: In New York, CPOAPs are chiefly governed by Chapter 24-A, Article 5 of the *Consolidated Statutes*. In New York, Powers of Attorney are

⁴⁷ NY. Stat (2024)

⁴⁸ NY. Stat (2024), s.2980(3).

⁴⁹ NY. Stat (2024), s.2981.

⁵⁰ NY. Stat (2024), s.2980(3).

continuing/durable by default and are effective when executed by the principal.⁵¹ Nevertheless, the *Consolidated Statutes* have a section on modifications which can amend the effective date.⁵² These types of Powers of Attorney documents are known as “statutory short form powers of attorney”. They have a subscribed, *pro forma* language which is partly to encourage their widespread use and acceptance, particularly with financial institutions.

The requisite formalities for a valid Power of Attorney are contained in section 5-1501B and require that: the document be signed by the principal or their representative,⁵³ the document be signed by two subscribing witnesses,⁵⁴ the document be acknowledged by a public notary, and the agent sign the document in the presence of the notary and two witnesses.⁵⁵ The document must also “substantially conform” with the statutory language contained in section 5-1501B. The requisite decisional capacity to grant a CPOAP is defined in section 5-1501 as the “ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney”.⁵⁶

Recognition of foreign Powers of Attorney is found in section 5-1512 of the *Consolidated Statutes*, which provides:

5-1512 - Powers of Attorney Executed in Other Jurisdictions

Notwithstanding the provisions of section 5-1501B of this title, a power of attorney executed in another state or jurisdiction in compliance with the law of that state or jurisdiction or the law of this state is valid in this state, regardless of whether the principal is a domiciliary of this state. A power of attorney that complies with section 5-1501B of this title and is executed in another state or jurisdiction by a domiciliary of this state is valid in this state. A power of attorney executed in this state by a

⁵¹ NY. Stat (2024), s.5-1501A.

⁵² NY. Stat (2024), s.5-1513.

⁵³ NY. Stat (2024), s.5-150B(b).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ NY. Stat (2024), s.5-1501.

domiciliary of another state or jurisdiction in compliance with the law of that state or jurisdiction or the law of this state is valid in this state.

Put simply, New York legislation recognises Powers of Attorney made outside of the state if made in compliance with the law in which it was originally executed. This is so, even when the principal/grantor does not reside in New York.

Guardianship: The central legislation for Guardianship in New York is found in Chapter 27, Article 81 of the *Consolidated Statutes*. In 2014, the New York legislature amalgamated the AGPPJA, with modifications, into Chapter 27, Article 83 of the *Consolidated Statutes*. For guardianship orders from foreign jurisdictions, section 83.05 states:

International application of this article

A court of this state may treat a foreign country as if it were a state for the purpose of applying sections 83.01 through 83.37 of this article.

The process therefore enables a New York court to treat foreign jurisdictions, such as Ontario, in the same manner as another American state. Section 83.33 provides that acceptance of a foreign guardianship order requires the appointed foreign guardian to petition the court to accept their appointment.⁵⁷ This petition must include a copy of the original foreign Guardianship order. Notice must be given to those who would require notice either in New York, or the state, or territory the order originated from.

Section 83.33 grants a New York court the discretion to accept a foreign Guardianship Order. If satisfied, the New York court may issue a final order accepting the petition and appointing the guardian of the person or the property in New York.⁵⁸ No later than 90 days after the issuance of a final order, the court must determine whether the guardianship of the property or the person needs to be modified to conform to the law of New York.⁵⁹

IV. APPLICATION OF THE LAWS IN ONTARIO, FLORIDA, AND NEW YORK

⁵⁷ In accordance with NY. Stat (2024), Article 81.

⁵⁸ NY. Stat (2024), s.83.33(e).

⁵⁹ NY. Stat (2024), s.83.33(f).

Consider the following hypothetical scenario:

- “Mr. Blake” is an elderly man who lives and owns property in Florida. He is a citizen of both Canada and the United States.
- Before moving to Florida, Mr. Blake spent many years in Ontario and even executed Powers of Attorney there. These documents appoint his daughter, who lives in Ontario, as his substitute-decision maker.
- In recent years, Mr. Blake has suffered cognitive impairment and has been diagnosed with Alzheimer’s. Further still, he is no longer capable of managing his property, or his personal care and will likely need to be moved to a retirement home.
- Mr. Blake’s daughter has assumed her role as her father’s attorney. She has decided that his property in Florida should be sold to fund his increasing care costs. She will also be required to make decisions regarding her father’s health care.

Unfortunately, the above scenario is not an uncommon one. For present purposes, this scenario can also be reversed, with Mr. Blake instead residing in Ontario, with a Power of Attorney, Advance Directive, or a Guardianship order from Florida. The following is an overview of how the law would be applied.

Scenario #1 – Mr. Blake lives in the Florida with Ontario Powers of Attorney/ Guardianship Order

In the first scenario, Mr. Blake lives and has property in Florida. Mr. Blake has an Ontario CPOAP, and POAPC which appoint his daughter, who lives in Ontario.

Florida

Florida’s legislation would permit the recognition of an Ontario CPOAP only to the extent it complies with the state’s own laws, not the laws of Ontario. One concern is that there is a divergence in the requisite formalities for a Florida Power of Attorney compared to one from Ontario. For instance, Florida requires the acknowledgement and signature of a public notary, whereas Ontario does not.

Further still, there are the distinct requirements under section 709.2201(1) of the *Florida Statutes*, which state that an attorney, “may only exercise authority specifically granted to

the agent in the power of attorney [...] [with] general provisions in a power of attorney which do not identify the specific authority granted, such as provisions purporting to give the agent authority to do all acts that the principal can do, are not express grants of specific authority, and do not grant any authority to the agent". Ontario Powers of Attorney are typically more succinct and do not enumerate the powers granted therein. Instead, these powers are codified in the *SDA* and the common law. Consequently, if Mr. Blake's daughter sought to sell her father's property in Florida, she would require a Power of Attorney document explicitly granting her the authority to do so.

Unlike Powers of Attorney, the *Florida Statutes* do not permit the recognition of foreign Advance Directives. For this reason, Mr. Blake's daughter would likely face difficulty in recognition of her Ontario Power of Attorney for Personal Care.

What if Mr. Blake's daughter instead was a court-appointed Guardian of the Property or Person? In such circumstances, she would need to file a petition with the court in Florida pursuant to section 744.307 of the *Florida Statutes*. This petition would need to demonstrate her appointment, as well as delineate all of Mr. Blake's property, its estimated value, and any liabilities in Florida. Given Mr. Blake's daughter does not reside in Florida, she would need to designate a 'resident agent', that being a person whose domicile is in that state and who could act as her representative. The court would then determine, in its discretion, whether a foreign bond, or other security is required.

New York

What if Mr. Blake lived in New York? Fortunately, New York has a comprehensive legislative regime for recognising foreign substitute decision making documents and Guardianship orders.

For CPOAPs, section 4-1512 of the *Consolidated Statutes* succinctly states that, "a power of attorney executed in another state or jurisdiction in compliance with the law of that state, or jurisdiction, or the law of this state is valid" in New York. Likewise, for Powers of Attorney for Personal Care, section 2990 of the *Consolidated Statutes* states that, "a health care proxy or similar instrument" may be recognised if executed in another jurisdiction in compliance with the laws of that place.

If Mr. Blake's daughter was appointed under a Guardianship order, she would need to file a petition with the court in New York pursuant to section 83.33 of the *Consolidated Statutes*. A New York court may in its discretion, issue a final order accepting the petition and appoint her as Mr. Blake's guardian to deal with his property and personal care in the state.

Scenario #2 – Mr. Blake lives in Ontario with Florida Powers of Attorney/ Guardianship Order

In the second scenario, Mr. Blake lives and owns property in Ontario. Mr. Blake has a Power of Attorney, and Advance Directive from Florida which appoint his daughter, who also lives in Florida.

Recognition of foreign Power of Attorneys in Ontario can be a relatively straightforward process. Mr. Blake could have his Power of Attorney, and Advance Directive recognised in Ontario in accordance with section 85 of the *SDA*. It merely requires an examination to determine if the document was validly executed in accordance with the law in which the document was executed or where the grantor was domiciled at the time of execution. Some uncertainty exists on whether an Advance Directive, which in all reality operates in a similar manner to a POAPC, would be recognised under section 85 of the *SDA*. Unfortunately, little insight can be gleaned from case law since the Ontario courts have yet to consider this provision.

The main issue arises if Mr. Blake's daughter were to be appointed under a Guardianship order in Florida. As previously discussed, section 86 of the *SDA* provides for "prescribed foreign jurisdictions". And yet, no foreign jurisdictions have ever been listed in the *SDA*'s regulations. 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.

In Ontario, only one reported court decision has dealt 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*,⁶⁰ provides a succinct overview of the legislative gap inherent in section 86 of the *SDA*.

In *Cariello v. Father Michele Perrella*, the Ontario Superior Court of Justice examined section 86 of the *SDA*. The case raised the question of which jurisdiction had Guardianship authority over a retired Roman Catholic Priest, with ties in both Ontario and Italy. In 2010, 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. As a result, he 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. Father Perrella's brother brought an application for guardianship appointment in Italy. The Italian court appointed a lawyer, Maria Cariello, as his interim guardian. Ms. Cariello traveled to Toronto for the purpose of asking the Ontario Superior Court to reseal the Italian guardianship order. It was argued that Italian courts had jurisdiction to deal with Father Perrella's incapacity and argued that the Ontario court should decline jurisdiction based on section 86 of the *SDA*.

The Ontario Court held that because the Ontario government had not made Italy a prescribed jurisdiction for the purposes of section 86, it 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.⁶¹

As Ontario's legislation has not fully adapted to the constraints and demands of modern society, an incapable person under a foreign Guardianship order with property in Ontario

⁶⁰ *Cariello v. Perrella*, 2013 ONSC 7605 (Ont. S.C.J.).

⁶¹ *Ibid.* [emphasis added]

will be faced with a difficult task. They may be required to bring an application for Guardianship in Ontario; bringing with it the prohibitive considerations of time and cost.

V. CONCLUDING COMMENTS

As it stands, there remain gaps in the above-noted legislative regimes. Florida is missing a recognition mechanism for the foreign Advance Directives, or POAPCs. Ontario's *SDA* has a legislative gap where it concerns the recognition of foreign guardianship orders, with no prescribed foreign jurisdictions. It appears that New York has the most comprehensive of the three regimes.

Cross-border ownership of property and domicile is common between Canadians and Americans. These arrangements are particularly prevalent amongst older adults with wealth, who may experience cognitive decline or illness such that they require substitute decision makers to act on their behalf. For these reasons, having a comprehensive and practical regime that recognises foreign Powers of Attorney, Advance Directives and Guardianship Orders is of utmost importance and will only become a more pressing issue in the future.

Recognition of Powers of Attorney / Health Care Directives across Canada (AB) (BC) (MB) (NB) (NL) (NWT) (NS) (NV) (ON) (PEI) (QC) (SK) (YK)

Kimberly Whaley, WEL Partners.

PROVINCE	LEGISLATION	REGIME	DEFINITION(S)
ALBERTA	<i>Powers of Attorney Act,</i> RSA 2000, c P-20 Section 2(5)	A Power of Attorney executed outside of Alberta is valid if: <ul style="list-style-type: none"> (i) It is valid according to the laws of the jurisdiction in which it was executed; and (ii) The attorney's authority survives the incapacity of the grantor. 	
	<i>Personal Directives Act,</i> RSA 2000, c P-6 Section 7.3	A directive executed outside of Alberta is valid if it complies with the requirements contained in the <i>Personal Directives Act</i> .	
BRITISH COLUMBIA	<i>Power of Attorney Act,</i> RSBC 1996, c 370 Section 38 <i>Power of Attorney Regulation,</i> BC Reg 20/2011 Section 4	A Power of Attorney made outside of British Columbia is deemed valid if: <ul style="list-style-type: none"> (i) It applies or continues to apply when the adult is incapable; (ii) was made outside of BC; and (iii) complies with the prescribed requirements in the Regulations. <p>The <i>Power of Attorney Act Regulation</i> provides:</p> <ul style="list-style-type: none"> (i) Recognition only applies to Powers of Attorney when the grantor was a resident of Canada, the United States, the United Kingdom, Australia or New Zealand; and (ii) The Power of Attorney must be accompanied by a certificate from a practicing lawyer in the jurisdiction where it was made, confirming its compliance with its laws. 	
	<i>Representation Agreement Act,</i> RSBC 1996, c 405 Section 41	Subject to British Columbia law, a representation agreement executed outside of the province is valid if: <ul style="list-style-type: none"> (i) It performs the function of a representation agreement; (ii) Was made outside of British Columbia; and (iii) Complies with any prescribed requirements. 	“representation agreement” refers to a substitute decision making document regarding health care decisions or routine financial decisions (paying bills, purchasing food see s.7(1)(b)).

Recognition of Powers of Attorney / Health Care Directives across Canada (AB) (BC) (MB) (NB) (NL) (NWT) (NS) (NV) (ON) (PEI) (QC) (SK) (YK)

PROVINCE	LEGISLATION	REGIME	DEFINITION(S)
MANITOBA	<i>The Powers of Attorney Act</i> , CCSM c P97 Section 25	A foreign Power of Attorney is valid if: (i) It is valid according to the law of that place; and (ii) It provides that it is Continuing despite the incompetence of the donor after the execution of the document.	
	<i>The Health Care Directives Act</i> , CCSM c H27 Section 10	A directive made outside of Manitoba that complies with the requisite requirements under <i>The Health Care Directives Act</i> is deemed valid.	
NEW BRUNSWICK	<i>Enduring Powers of Attorney Act</i> , SNB 2019, c 30	A Power of Attorney executed outside of New Brunswick is valid if: (i) It grants authority for a person to act on behalf of another in relation to property and financial affairs or personal care; (ii) The attorney may exercise their authority after the incapacity of the grantor; and (iii) The document is valid in accordance with the legislation of the place where it was made.	
NEWFOUNDLAND AND LABRADOR	<i>Enduring Powers of Attorney Act</i> , RSNL 1990, c E-11	<u>No provision for recognition of Powers of Attorney executed outside of Newfoundland and Labrador.</u>	
	<i>Advance Health Care Directives Act</i> , SNL 1995, c A-4.1	<u>No provision for recognition of directives executed outside of Newfoundland and Labrador.</u>	
NORTHWEST TERRITORIES	<i>Powers of Attorney Act</i> , SNWT 2001, c 15 Section 25	A Power of Attorney executed outside Northwest Territories is valid if: (i) It is valid according to the law of that place; and (ii) It provides in the document that it is enduring / continuing.	
	<i>Personal Directives Act</i> , SNWT 2005, c 16 Section 3(2)	A personal directive made outside of Northwest Territories is valid if: (i) A certified lawyer of that jurisdiction confirms in writing that the directive conforms with that jurisdiction's legislative requirements; and (ii) The directive would have met the applicable requirements under the <i>Personal Directives Act</i> .	

Recognition of Powers of Attorney / Health Care Directives across Canada (AB) (BC) (MB) (NB) (NL) (NWT) (NS) (NV) (ON) (PEI) (QC) (SK) (YK)

PROVINCE	LEGISLATION	REGIME	DEFINITION(S)
NOVA SCOTIA	<p><i>Powers of Attorney Act</i>, RSNS 1989, c 352</p> <p>Section 20</p>	<p>A Power of Attorney made outside of Nova Scotia is valid if:</p> <ul style="list-style-type: none"> (i) A person gives another person authority under the document to act on their behalf regarding their property and finances; and (ii) The document is valid according to the laws of the jurisdiction it was executed in. 	
	<p><i>Personal Directives Act</i>, SNS 2008, c 8</p> <p>Section 24</p>	<p>A directive / Power of Attorney for Personal Care made outside of Nova Scotia is valid if executed:</p> <ul style="list-style-type: none"> (i) In accordance with the requirements of the <i>Personal Directives Act</i>; (ii) In accordance with the legislation of the jurisdiction where the document was made; or (iii) The jurisdiction where the grantor was a resident when the document was made. 	
NUNAVUT	<p><i>Powers of Attorney Act</i>, SNU 2005, c 9</p> <p>Section 26</p>	<p>A Power of Attorney executed outside of Nunavut is valid if:</p> <ul style="list-style-type: none"> (i) It is valid in accordance with the legislation of the jurisdiction it was made; and (ii) It provides that the attorney's authority survives the incapacity of the grantor. <p>Note: Nunavut does not have legislation for the granting of a Power of Attorney for Personal Care / Health Care Directive.</p>	
ONTARIO	<p><i>Substitute Decisions Act</i>, S.O 1992, c. 30</p> <p>Section 85</p>	<p>A Power of Attorney made outside of Ontario is valid if at the time of execution it complied with the internal law of the place where:</p> <ul style="list-style-type: none"> (i) The POA was executed; (ii) The grantor was then domiciled; or (iii) The grantor had their habitual residence. <p>This provision applies to both Powers of Attorney for Property and Personal Care.</p>	
PRINCE EDWARD ISLAND	<p><i>Powers of Attorney Act</i>, RSPEI 1988, c P-16</p>	<p><u>No provision for recognition of Powers of Attorney executed outside of Prince Edward Island.</u></p>	
	<p><i>Consent to Treatment and Health Care Directives Act</i>, RSPEI 1988, c C-17.2</p> <p>Section 34</p>	<p>A health care directive made outside of Prince Edward Island is valid if:</p> <ul style="list-style-type: none"> (i) It meets the formal requirements of the <i>Consent to Treatment and Health Care Directives Act</i>; and (ii) It meets the formal requirements of the legislation of the jurisdiction where it was executed or where the grantor was habitual residing at the time. 	

Recognition of Powers of Attorney / Health Care Directives across Canada (AB) (BC) (MB) (NB) (NL) (NWT) (NS) (NV) (ON) (PEI) (QC) (SK) (YK)

PROVINCE	LEGISLATION	REGIME	DEFINITION(S)
QUEBEC	<p><i>Civil Code of Quebec</i>, CQLR c CCQ-1991</p> <p>Article 2166</p>	<p>In Quebec, the <i>Civil Code</i> provides that a mandate (that being a document equivalent to a Power of Attorney or directive) is only effective following a court process known as ‘homologation’.</p> <p>Homologation is an application wherein the court provides authority for the appointed substitute decision maker (known as a ‘Mandatary’) to act. This application must include a medical / psychosocial assessment report confirming the incapacity of the grantor.</p>	<p>“mandate” refers to a contract by which a person empowers another person to perform acts on his/her behalf. The power, and the writing evidencing it, is called the power of attorney. These apply to the grantor’s property and personal care.</p>
SASKATCHEWAN	<p><i>Powers of Attorney Act</i>, 2002, SS 2002, c P-20.3</p> <p>Section 13</p>	<p>A Power of Attorney made outside of Saskatchewan is valid if:</p> <ul style="list-style-type: none"> (i) It is executed in accordance with the law of jurisdiction in which it was executed; and (ii) The document provides that the authority conferred on the attorney survives the incapacity of the grantor. 	
	<p><i>The Health Care Directives and Substitute Health Care Decision Makers Act</i>, 2015, SS 2015, c H-0.002</p> <p>Section 8</p>	<p>A directive made outside of Saskatchewan is valid if it complies with the requirements of <i>The Health Care Directives and Substitute Health Care Decision Makers Act</i>.</p>	
YUKON	<p><i>Enduring Power of Attorney Act</i>, RSY 2002, c 73</p> <p>Section 3(5)</p>	<p>A Power of Attorney executed outside of Yukon is valid if:</p> <ul style="list-style-type: none"> (i) It is a valid Power of Attorney in the jurisdiction where it was executed; and (ii) The attorney’s authority is not terminated by the incapacity of the grantor. 	
	<p><i>Care Consent Act</i>, SY 2003, c 21, Sch B</p> <p>Section 34</p>	<p>A directive made outside of Yukon is valid if it complies with the requirements contained in the <i>Care Consent Act</i>.</p>	

Recognition of Powers of Attorney / Health Care Directives across Canada
(AB) (BC) (MB) (NB) (NL) (NWT) (NS) (NV) (ON) (PEI) (QC) (SK) (YK)

Recognition of Guardianship Orders across Canada
(AB) (BC) (MB) (NB) (NL) (NWT) (NS) (NV) (ON) (PEI) (QC) (SK) (YK)

Kimberly Whaley, WEL Partners.

PROVINCE	GUARDIANSHIP LEGISLATION	REGIME	DEFINITION(S)
ALBERTA	<p><i>Adult Guardianship and Trusteeship Act</i>, S.A 2008, c A-4.2</p> <p>Section 73</p> <p><i>Adult Guardianship and Trusteeship Regulation</i>, Alta Reg 219/2009</p> <p>Section 82</p>	<p>Any person may apply for a foreign order from a non-Canadian jurisdiction which is approved by the Lieutenant Governor in Counsel or from a Canadian jurisdiction be resealed. If granted by the court, the foreign order will have the same force and effect as if issued by an Alberta court.</p> <p>Any person may bring an application under section 73 and must file the requisite documentation required by section 82 of the <i>Adult Guardianship and Trusteeship Regulation</i>.</p>	<p>“foreign order” means an order made by a court or body outside Alberta that appoints a person having duties comparable to those of a co-decision-maker, guardian or trustee with respect to a person who is 18 years or age or older or with respect to the property of such a person.</p>
BRITISH COLUMBIA	<p><i>Patients Property Act</i>, R.S.B.C 1996 c 349</p> <p>Section 31</p>	<p><u>No recognition of foreign orders under British Columbia’s guardianship legislation.</u></p> <p>The <i>Patients Property Act</i> provides that a resident outside British Columbia who would be a patient if a resident and who holds property in the province may have someone appointed on their behalf to manage their property.</p> <p>Note: British Columbia did have a provision under the <i>Adult Guardianship Act</i>, R.S.B.C. 1996, C. 6, s. 42 which recognised foreign guardianship orders. This provision has since been repealed.</p>	
MANITOBA	<p><i>Vulnerable Persons Living with a Mental Disability Act</i>, C.C.S.M. c. V90</p> <p>Section 114(2)</p> <p><i>Adults Living with an Intellectual Disability Regulation</i>, Man Reg 208/96</p>	<p><u>No recognition of foreign orders under Manitoba’s guardianship legislation.</u></p> <p>Any person may apply for their appointment as substitute decision maker for property of a person who is not a resident of Manitoba but owns property in the province. The applicant must prove that the person has been determined incapable by the laws of another jurisdiction of Canada or one designated by the Regulation (none currently listed).</p>	
NEW BRUNSWICK	<p><i>Supported Decision-Making and Representation Act</i>, SNB 2022, c 60</p> <p>Section 61</p>	<p>A person appointed under an order made outside New Brunswick with similar powers to a ‘representative’ (guardian) may apply to have the order declared as having the same force and effect as if made by a court in the province.</p>	

Recognition of Guardianship Orders across Canada

(AB) (BC) (MB) (NB) (NL) (NWT) (NS) (NV) (ON) (PEI) (QC) (SK) (YK)

PROVINCE	GUARDIANSHIP LEGISLATION	REGIME	DEFINITION(S)
		If the guardianship order is for property, the New Brunswick court will require a financial summary of the incapable person's property as part of the application.	
NEWFOUNDLAND AND LABRADOR	<i>Mentally Disabled Persons' Estate Act</i> , R.S.N.L. 1990, c. M-10 Section 14	<u>No recognition of foreign orders under Newfoundland and Labrador's guardianship legislation.</u> A person who is granted authority in respect of an adult under an order from outside the province may make an application to be granted authority to deal with property held in Newfoundland and Labrador. This provision concerns non-residents of the province.	
NORTHWEST TERRITORIES	<i>Guardianship and Trusteeship Act</i> , S.N.W.T. 1994, c 29 Section 15	Any person may apply to have an extraterritorial order for guardianship resealed by the court. The court may order that the extraterritorial order have the same force and effect as if it were made by a Northwest Territories court. The court may impose conditions, restrictions, or modifications to the extraterritorial order. It may also specify a time to review the order at a later date.	"extraterritorial order" means (a) an order made by a court outside Nunavut that appoints a person having duties comparable to a trustee or guardian, or (b) an official appointment of a person appointed outside Nunavut who is charged with the duty of managing, handling, administering or caring for another person or estate of another person; (ordonnance extraterritoriale)
NOVA SCOTIA	<i>Adult Capacity and Decision-making Act</i> , SNS 2017, c4 Section 65	A person who is granted authority in respect of an adult under a foreign order may make an application. The court may declare that the foreign order is of the same force and effect as if a Nova Scotia court issued the order. Where a foreign order concerns financial matters, the application must include an accurate accounting of the incapable person's property, including their assets, and liabilities.	"foreign order" means an order made by a court or other body outside the Province that appoints a person having duties comparable to those of a representative; "representative" means a person appointed as a decision-making representative under this Act;
NUNAVUT	<i>Guardianship and Trusteeship Act</i> , SNWT (Nu) 1994, c 29 Section 15	Any person may apply to have an extraterritorial order for guardianship resealed by the court. The court may order that the extraterritorial order have the same	"extraterritorial order" means (a) an order made by a court outside Nunavut that appoints a person having duties comparable to a trustee or guardian, or (b) an

Recognition of Guardianship Orders across Canada (AB) (BC) (MB) (NB) (NL) (NWT) (NS) (NV) (ON) (PEI) (QC) (SK) (YK)

PROVINCE	GUARDIANSHIP LEGISLATION	REGIME	DEFINITION(S)
		<p>force and effect as if it were made by a Nunavut court.</p> <p>The court may impose conditions, restrictions, or modifications to the extraterritorial order. It may also specify a time to review the order at a later date.</p>	<p>official appointment of a person appointed outside Nunavut who is charged with the duty of managing, handling, administrating or caring for another person or estate of another person; (ordonnance extraterritoriale)</p>
ONTARIO	<p><i>Substitute Decisions Act, S.O 1992, c. 30</i></p> <p>Section 86</p>	<p>Any person may apply to the court for an order resealing a foreign order that was made in a province or territory of Canada <u>or in a prescribed jurisdiction</u>.</p> <p>Note: there is currently no list of prescribed foreign jurisdictions in the <i>Substitute Decisions Act</i> regulations.</p>	<p>“foreign order” means an order made by a court outside of Ontario that appoints, for a person who is sixteen years of age or older, a person having duties comparable to those of a guardian of property or guardian of the person.</p>
PRINCE EDWARD ISLAND	<p><i>Adult Guardianship and Trusteeship Act, 1988, c A-4.2</i></p> <p><i>Public Trustee Act, RSPEI 1988, c P-32.2</i></p> <p>Section 34</p>	<p><u>No recognition of foreign orders under Prince Edward Island’s guardianship legislation.</u></p> <p>Where a person has been declared incapable in another province or territory of Canada and has property in Prince Edward Island, the Lieutenant Governor in Council has discretion to appoint someone as their guardian (committee) in the province.</p> <p>Note: Prince Edward Island has tabled new legislation under the <i>Adult Guardianship and Trusteeship Act, SPEI 2023, c 11</i> which would recognize foreign guardianship orders for both property and the person.</p>	
QUEBEC	<p><i>Civil Code of Quebec, CQLR c CCQ-1991</i></p> <p>Articles 256 - 297</p>	<p><u>No recognition of foreign orders under Quebec’s tutorship legislation.</u></p> <p>Quebec utilizes ‘tutors’ of the property or the person pursuant to the <i>Civil Code of Quebec</i>.</p>	
SASKATCHEWAN	<p><i>The Adult Guardianship and Co-Decision-making Act, S.S 2000, c A-5.3</i></p> <p>Section 65.1</p>	<p>A person who is appointed by a foreign order may apply to have the guardianship order resealed in Saskatchewan.</p> <p>The guardian for property must provide the court with an accurate inventory of the estate of the incapable person, including income, assets and liabilities.</p>	<p>“foreign order” means an order made by a court outside Saskatchewan that appoints a person to have duties comparable to those of a personal guardian or property guardian</p>

Recognition of Guardianship Orders across Canada
(AB) (BC) (MB) (NB) (NL) (NWT) (NS) (NV) (ON) (PEI) (QC) (SK) (YK)

PROVINCE	GUARDIANSHIP LEGISLATION	REGIME	DEFINITION(S)
		<p>The court may order that the foreign order is of the same force and effect as if issued by a Saskatchewan court. The foreign order is subject to the laws of Saskatchewan and review by the court.</p>	
YUKON	<p><i>Adult Protection and Decision-Making Act</i>, SY 2003, c 21, Sch A</p> <p>Section 56</p> <p><i>Adult Protection and Decision-Making Regulation</i>, YOIC 2005/78</p> <p>Section 18</p>	<p>Any person may apply to the Supreme Court of Yukon for an order resealing a foreign order that was made either in another Canadian jurisdiction or in a jurisdiction prescribed by the regulations.</p> <p>The court may declare that the foreign order is of the same force and effect as if issued by a Yukon court. This is subject to any further conditions imposed by the court and Yukon law.</p> <p>The <i>Regulation</i> currently prescribes nineteen (19) countries including Austria, Belgium, Germany, Italy, England, any state of the United States, and Australia.</p>	<p>"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</p>



**RESEALING FOREIGN GUARDIANSHIP ORDERS IN ONTARIO:
*PRESCRIBING A SOLUTION TO THE LEGISLATIVE GAP***

Bryan Gilmartin & Brett Book

WEL Partners

www.welpartners.com

CONTENTS

I. INTRODUCTION	1
THE PROBLEM IN ONTARIO	1
THE CURRENT REGIME	2
II. THE GROWING NEED	3
FOREIGN OWNERSHIP IN CANADA	3
III. ANALYZING THE LEGISLATIVE GAPS	4
SECTION 86 OF THE SUBSTITUTE DECISIONS ACT.....	4
CARIELLO V FATHER PERRELLA	5
ACADEMIC INSIGHTS ON THE INEFFECTIVENESS OF S 86.....	8
IV. PROPOSED SOLUTIONS	10
A) LEGISLATION IN CANADIAN PROVINCES	10
Yukon’s Approach	11
Saskatchewan’s Approach.....	12
Nova Scotia’s Approach	14
The Northwest Territories’ Approach.....	15
B) THE ENFORCEMENT OF NON-MONETARY JUDGMENTS	16
V. CONCLUSION	19

I. INTRODUCTION

In our modern society, people and their assets have become more mobile. As a result, it is a reality that now, more than ever, 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 Problem 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 outside of Canada.

The practical concerns stem from the fact that attorneys and guardians are acutely involved in virtually all aspects of an incapable person's life including the management of property, personal finance, 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, an incapable grantor 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, an incapable person under foreign guardianship with property in Ontario may be faced with a difficult task. They may be required to bring 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)).

The problem with section 86 lies in the fact that Ontario yet to prescribe any jurisdictions, even though section 90(g) of the *SDA* authorizes the Lieutenant Governor in Council with the power to do so.

Other Canadian provinces and territories have developed their own legislation which can be looked to for solutions. For example, Yukon’s legislation prescribes a full list of jurisdictions. Saskatchewan, Nova Scotia, and the Northwest Territories on the other hand offer criteria which can be applied to a guardianship order from any jurisdiction.

II. THE GROWING NEED

Foreign Ownership in Ontario

In Canada, ownership of property by non-Canadian owners comes with a significant feature: 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 owners. 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-residents purchasing residential property.² Notably, recreational property such as cabins, cottages, and other vacation homes have been exempted from the 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 Americans.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,

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.tvto.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>.

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 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

Resealing is a process whereby the court will confirm a Grant of Probate from another jurisdiction. Historically, resealing is derived from the concept and process of resealing letters of probate from other provinces, territories, and the United Kingdom. In Ontario, 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.¹⁰

Section 86 of the *SDA* 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

Orders of this nature can be resealed on application to the court if the order was made in another province or territory of Canada, or, if the order was made in any other jurisdiction prescribed by the government of Ontario.¹²

An application for the resealing of a foreign guardianship order must include both a copy of the foreign order that either bears the foreign court’s seal or has been certified by some

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/>

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 RRO 1990, reg 194 at R 74.08.

¹¹ SO 1992, c 30 at s 86(1).

¹² SO 1992, c 30 at 86(2).

officer of that court, and a certificate stating that the order has not been revoked and is of full effect.¹³

Importantly, section 86 provides that 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

As discussed, section 90(g) of the SDA authorizes the Lieutenant Governor in Council to make a list of prescribed jurisdictions for the purposes of section 86.15. However, currently there are no prescribed jurisdictions.

Because of this, section 86 appears to be of limited use in addressing contentious guardianship proceedings 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 anywhere else. 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 in which section 86 has been examined,¹⁶ 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

The problem was most recently addressed in the Ontario Superior Court decision in *Cariello v Father Perrella*.¹⁷ In that case, an application to reseal a foreign guardianship order under section 86 of the SDA was unsuccessful.

¹³ SO 1992, c 30 at 86(3).

¹⁴ SO 1992, c 30, at 86(4).

¹⁵ SO 1992, c 30 at s 90(g).

¹⁶ See *Re Durity Estate*, 1996 CarswellOnt 5933 (Ont. Gen. Div.) [*Re Durity*]; *Cariello v. Perrella*, 2013 ONSC 7605 (Ont. S.C.J.).

¹⁷ 2013 ONSC 7605 [*Cariello*].

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.¹⁸ By 2010 he was officially registered as an Italian citizen living in Italy.¹⁹

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.²⁰ 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.²¹

Father Perrella purportedly executed POA documents which appointed two of his long-time friends in Toronto.²² 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.²³ 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.²⁴ 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.²⁵ Justice Mesbur determined that not only could the court not reseal the Italian guardianship order but also 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

¹⁸ *Cariello, supra* at para 9.

¹⁹ *Ibid.*, at para 10.

²⁰ *Ibid.*, at para 15.

²¹ *Ibid.*, at paras 23-24.

²² *Ibid.*, at para 21.

²³ *Ibid.*, at para 39.

²⁴ *Ibid.*, at para 40.

²⁵ *Ibid.*, at para 48.

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.²⁶

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*.²⁷ 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 domiciled in Italy, 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."²⁸

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.²⁹

²⁶ *Ibid.*

²⁷ *Ibid.*, at para 51.

²⁸ *Ibid.*, at para 77.

²⁹ *Ibid.*, at paras 85-87.

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.

In our increasingly mobile world, 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 that are discussed in this paper 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 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 just that may indicate a possible intention to address the issue at a later time given that the government has created a tool by which it can do so. In the meantime, section 86 does continue to have some effect in allowing for the resealing of guardianship orders made in other parts of Canada. In any event, it would likely 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.”³⁰

³⁰ "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].

In regard 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.”³¹

In 2017, in his article *Foreign Guardians of Property and the Ontario Substitute Decision Act*,³² Matthew Furrow argues that “[i]t may seem desirable for the Ontario legislature to create a list of prescribed foreign jurisdictions to which s. 86 should apply.”³³ Furrow goes on to say that “... this would be a mixed blessing to foreign guardians. The effect of prescribing a foreign jurisdiction as being subject to s. 86 would make it easier for a guardian there to deal with real property in Ontario, but would impose a greater burden than before where personal property is concerned.”³⁴

Furrow argues that “[e]ven if the legislature did enact a regulation specifying certain foreign jurisdictions to which s. 86 were to apply, the *SDA* remains silent on how other foreign guardianships should be recognized.”³⁵

Furrow contemplates that “the legislature should strongly consider reviving the previously clear distinction in treatment between real property and personal property where extra-provincial and foreign guardianships are concerned.”³⁶

In his article, Furrow closely examines predecessor legislation to the *SDA* and concludes that these actually contained limited provisions permitting the gathering of certain assets by foreign guardians. There is no equivalent to these sections in the modern *SDA*. However, the solution proposed in this article contemplates the Ontario government adopting similar legislation from other provinces where there is a requirement that a proposed guardian has to state the income and profits of the estate and set out the assets, debts and credits of the adult.

³¹ BCLI, *supra* at 141.

³² (2017) 37:1 *Est Tr & Pensions J* 20 [Furrow].

³³ Furrow, *supra* at 38.

³⁴ *Ibid.*

³⁵ Furrow, *supra* at 34.

³⁶ *Ibid.*, at 39.

The authors cited above appear to agree that not only is there a clear gap in the legislation but also, that the proposed solution to simply prescribe a list of jurisdictions does not serve a useful purpose and may actually contribute to rather than ameliorate the problem.

Furrow is adamant that prescribing a foreign jurisdiction would make it easier to deal with real property in Ontario but would lead to barriers where personal property is concerned. To this end, his solution of reviving the previous distinction in treatment between real property and personal property is not without merit. Echoing his thoughts, this article argues that legislation already exists in other provinces which requires a proposed guardian provide the court with particulars of the adult to be under guardianship and their estate. If the government of Ontario wishes to address the current issue with section 86 of the *SDA*, these suggestions should all be evaluated equally.

IV. PROPOSED SOLUTIONS

In proposing the ideal solution to the legislative gap inherent in section 86 of the *SDA*, the following will explore existing legislative approaches that are available in select Canadian provinces. After a thorough examination of the potential to adopt some of these approaches in Ontario, the following will address the novel suggestion of enforcing a foreign non-monetary order along the lines of the “real and substantial connection” test which was adopted and expanded by the Supreme Court of Canada (“**SCC**”).

a) Legislation in Canadian Provinces

There are four Canadian provinces and territories which have legislation in place which 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 straight-forward and simple solution: a list of prescribed jurisdictions. The other three, however, have developed criterion for resealing a guardianship order from a foreign jurisdiction.

Barring legislative amendments to close the gap in section 86, it is plausible that in any event, a creative litigant will eventually resort to a novel solution such as the enforcement of a foreign non-monetary order pursuant to the real and substantial connection test which was first adopted by the SCC in *Morguard Investments Ltd v De Savoye*³⁷ and further

³⁷ 1990 CanLII 29 (SCC), [1990] 3 SCR 1077 [*Morguard*].

expanded by the Court in *Pro Swing Inc v Elta Golf Inc.*³⁸ The following will take a closer look at these proposed solutions.

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*³⁹ 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

³⁸ 2006 SCC 52 (CanLII), [2006] 2 SCR 612 [*Pro Swing Inc.*].

³⁹ 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*⁴⁰ 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.⁴¹

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. This notable feature of Yukon's legislation begs the question of whether this regime actually closes the legislative gap that is experienced in Ontario. By creating a fixed list and not criterion for resealing, it is arguable that there is still a practical barrier in that some countries are not recognized. 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.⁴²

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.

⁴⁰ YOIC 2005/78.

⁴¹ YOIC 2005/78 at s. 18.

⁴² See Government of Canada, "Canada-Paraguay relations" (September 27, 2022), accessed online: <https://www.international.gc.ca/country-pays/paraguay/reasons.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*,⁴³ 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 65.3.⁴⁴

As part of the resealing application, Saskatchewan requires applicants to serve a copy of the application upon the following parties:⁴⁵

- (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;

⁴³ SS 2000, c A-5.3 [AGCA].

⁴⁴ AGCA, *supra* at s 65.1.

⁴⁵ 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.⁴⁶

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.⁴⁷

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*,⁴⁸ 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 in the province to the court, and update that inventory as needed.

⁴⁶ AGCA, *supra* at s 65.2.

⁴⁷ *Ibid.*, at s 65.1(6).

⁴⁸ 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 chooses to dispense with the requirement if the court receives a certificate from an officer of the foreign court stating that security in a sufficient amount has been provided there.⁴⁹

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*,⁵⁰ 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 and 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).⁵¹

The approach of Saskatchewan, Nova Scotia, and the Northwest Territories present a viable solution that, if adopted in Ontario, would appear to completely resolve the issues raised in the *Cariello* decision with respect to the *SDA*.

⁴⁹ *ACDA*, *supra* at s 65.

⁵⁰ SNWT 1994, c 29 [*GTA*].

⁵¹ *GTA*, *supra* s 15(5).

b) The Enforcement of Non-Monetary Judgments

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 recognize the enforcement of non-monetary judgments as well. 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*,⁵² 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. The SCC in reaching its determination, upheld the BC decision which heavily criticized the old rules of enforcement.

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 author’s 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.”⁵³ Black and Swan conclude their

⁵² *Morguard, supra*.

⁵³ *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.”⁵⁴

In 2003, the test was expanded by the SCC in *Beals v Saldanha*⁵⁵ 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. This reasoning is analogous to the central argument of this paper: that increased mobility and ownership of property across borders has led to an amplified need for interjurisdictional approaches to substitute decision-making.

The decisions cited above 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.*⁵⁶ 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.”⁵⁷

In *The Bank of Nova Scotia Trust Company v. Pernica*,⁵⁸ the court recognized an order of the Supreme Court of the State of New York to the extent that it related to providing funds to the incapable person’s temporary guardian for the purpose of taking care of the well-being of the incapable person.

On July 10, 2019, Justice Knipel of 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. Justice Knipel 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

⁵⁴ 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].

⁵⁵ 2003 SCC 72 (CanLII), [2003] 3 SCR 416 [*Beals*].

⁵⁶ *Pro Swing Inc.*, *supra*.

⁵⁷ *Ibid.*, at para 64.

⁵⁸ 2020 ONSC 67 [*Pernica*].

was ordered by Justice Knipel to pay funds for Ida's well-being and authorized by his honour to pay up to \$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.

Justice Conway, writing on behalf of the Superior Court, 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.⁵⁹

Justice Conway 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.⁶⁰ Next, Justice Conway 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."⁶¹ The issue to be determined by Justice Conway concerned whether the order cannot be varied or abrogated, regardless of whether under appeal.⁶² Justice Conway concluded that the order requiring Scotia to pay the temporary guardian is clear, final and easily administered by the court.⁶³ His 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) for \$250,000 US and the funding of legal counsel. Justice Conway did not, however, recognize provisions of the order

⁵⁹ *Pernica*, *supra* paras. 8-9.

⁶⁰ 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.

⁶¹ *Pernica*, *supra* at para. 5.

⁶² 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.

⁶³ 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.

which grant the temporary guardian with the right to seek the medical and confidential information of Ida.

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

Saskatchewan's legislative approach permits a foreign guardianship order to be resealed if it meets what appears to be a very basic set of criteria. Adopting the approach taken in Saskatchewan avoids the complications that may arise by simply prescribing a closed-list of jurisdictions. Any review ahead of proposed amendments, however, should consider the approach already taken in Nova Scotia and the Northwest Territories, which allows courts the discretion to impose any terms, conditions or limits on the order as the court considers appropriate.

In canvassing the legislation of other provinces and contemplating the analyses set forth by the BCLI and Furrow, it is clear that the proposed solution to prescribe a list of jurisdictions may fall short of completely addressing the legislative gap inherent in section 86 of the *SDA*. For this reason, it appears to be more appropriate to develop criteria that can inform and guide courts through the process of resealing a foreign guardianship order.

V. CONCLUSION

As it stands, Ontario's *SDA* creates a legislative gap where it concerns the recognition of foreign guardianship orders in the province. Section 86 of the *SDA* provides the mechanism to recognise such orders and for the Lieutenant Governor in Council to prescribe jurisdictions but none have yet been added. As this article has explored, when one examines this gap with consideration for Canada's increasingly mobile and aging population, the issue is likely to become a more pressing.

In determining what Ontario's criteria may or should look like for recognising foreign guardianship orders, helpful guidance can be gained from examining existing legislation already available in Saskatchewan, Nova Scotia, and the Northwest Territories.

From an evaluation of existing legislation, the Ontario government could best service the legislative gap in section 86 by developing criteria that can be utilized by courts in applications for resealing foreign orders for guardianship.

Many of the suggestions and recommendations have come from practitioners who deal with the legislative gap directly in their practice. As a result, any review of the *SDA* should include a thorough evaluation and consultation process. Having said that, future amendments undertaken by the government of Ontario should not only evaluate what these other provinces are doing but should also consider some of the academic recommendations that are available and discussed in this article.

OCT. 6-8, 2024

STEP CANADA-USA 2024 CROSS-BORDER CONFERENCE

Chicago



Incapacity Planning

Moderator

- Kathleen Cunningham, LLB, MPS, TEP, Vancouver

Speakers

- Shelley Rhoades Perry, JD, TEP, Naples: Fiduciary Associates
- Kim Whaley, CS, LLM, TEP, Toronto: WEL Partners

Shifting Canadian and American Demographics

- Over **7.5M** adults over the age of 65 representing close to **20 %** of the total Canadian population
- Stats Canada estimates that by 2031, **1 in 4** Canadians will be **over 65**
- US Census Bureau: 55m or 16.8% of the total American population are aged 65 or over
- By 2050, this is expected to increase to 23%

Cognitive Decline/Impairment

- Dementia is the **8th leading** cause of death in the world
- Alzheimer's Canada estimates that over **700k** Canadians are living with dementia
- By 2050: over **1.7 million**
- **Columbia University: 10% of Americans over 65 suffer from dementia**
- **Risk of dementia doubles at age 85**
 - From 12.4% at 80-84 to 24.6%

Cross-border Property Ownership

- Many Canadians and Americans live and own property in both countries
- Canadians the highest proportion of foreign property buyers in the U.S.A. in 2023 (13%)
- Approx. 41% of all American property purchased by Canadians in Florida
- Approx. 9% of all homes in Fort Erie (small town on U.S.A.-Canadian border by Niagara Falls) are owned by Americans

POA Regime in Ontario

1. Continuing Power of Attorney for Property (“**CPOAP**”) under the *Substitute Decision Act* 1992, S.O. 1992, c. 30 (“**SDA**”);
2. Power of Attorney for Personal Care (“**POAPC**”) under the *SDA*; and
3. A Power of Attorney for Property (“**POA**”) under the *Powers of Attorney Act*, R.S.O. 1990, c. P.20 (“**POAA**”).

Requirements for a Valid POA in Ontario

- Under the *SDA* – grantor must be capable of granting a POA
- Must be signed by the grantor in the presence of two witnesses, each of whom must also sign
- Certain people cannot be witnesses
- Ceases to operate upon death of the grantor

Capacity to grant a POA in Ontario

- There is a statutory presumption of capacity to manage property and personal care (section 2 of the *SDA*)
- The *SDA* provides the requisite decisional capacity to grant a POA:
 - Capacity to grant a CPOAP - section 8(1) of the *SDA*
 - Capacity to grant a POAPC - section 47(1) of the *SDA*

Recognition of foreign POAs in Ontario

- The SDA recognizes Powers of Attorney from foreign jurisdictions.
- Section 85(1) of the SDA:
- A Power of Attorney is valid if at the time of its execution it complied with the internal law of the place where:
 - (a) the Power of Attorney was executed;
 - (b) the grantor was then domiciled; or
 - (c) the grantor then had his or her habitual residence.
- Determining a grantor's domicile or residence
- The SDA recognizes that grantor may have multiple POAs (s.12 and s.53)

Recognition of foreign Guardianship orders in Ontario

- Guardianship is governed by the SDA.
- Section 86 of the SDA:

Any person may apply to the court for an order resealing a foreign order that was made in a province or territory of Canada or in a prescribed jurisdiction.
- There is **no list of prescribed jurisdictions** in the SDA regulations.
- Accordingly, there is no avenue for an Ontario court to recognize a foreign guardianship order made outside of Canada.

Court Consideration of section 86 of the SDA

- *Cariello v. Father Perella*, 2013 ONSC 7605:
 - Roman Catholic Priest situated in Ontario.
 - Interim Guardianship order from Italy.
 - Honourable Justice Mesbur: Ontario court has no legislative authority to reseal Italian Guardianship order given lack of prescribed jurisdictions in SDA regulations.

Addressing the legislative gap in section 86 of the SDA

- Potential solutions from other Canadian provinces.
- Example: Saskatchewan's *The Adult Guardianship and Co-decision-making Act*, [SS 2000, c A-5.3](#), s. 65.1:
- Applicant must produce foreign order to be resealed; provide accurate estate information; serve the relevant parties; and, file a bond if necessary.
- Court granted discretion to determine whether it is in **best interests** of the adult to require a review of the foreign order and specify period within which the review is to take place.

The logo for STEP CANADA, featuring the word "STEP" in a bold, dark blue sans-serif font, followed by a square icon containing a white stylized "S" shape.

CANADA

Supporting trust and estate practitioners
in their pursuit of excellence

PROGRAM COMMITTEE IS SUPPORTED BY

STEP CANADA

45 Sheppard Avenue East, Suite 510
Toronto, Ontario M2N 5W9

Janis Armstrong

Director of Business Development
416.491.4949 ext 228
jarmstrong@step.ca

OCT. 6-8, 2024

STEP CANADA-USA 2024 CROSS-BORDER CONFERENCE

Chicago