



Enduring Powers of Attorney: Areas for Reform

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Consultation Paper on Enduring Powers of Attorney: Areas for Reform

TABLE OF CONTENTS

| | | |
|-------------|--|-----------|
| I. | Introduction | 1 |
| II. | Facilitating Recognition of the Document | 2 |
| III. | Clarifying the Duties of Attorneys | 6 |
| IV. | Issues for Persons Interacting with Attorneys | 10 |
| V. | Conclusion | 14 |

Consultation Paper on Enduring Powers of Attorney: Areas for Reform

I. Introduction

In recognition of the need to harmonize the laws of the western provinces in those areas where uniformity would be beneficial, the Alberta Law Reform Institute, the British Columbia Law Institute, the Manitoba Law Reform Commission and the Saskatchewan Law Reform Commission (the “Western Canada Law Reform Agencies”) have agreed to work together on joint reform projects. The focus of each project will be to effect reforms in the western provinces in a timely and efficient manner. The Western Canada Law Reform Agencies wish to thank the Alberta Law Foundation for providing initial funding for the creation of a Western Law Reform Initiative.

The first project of the Western Law Reform Agencies will focus on enduring powers of attorney, specifically:

- facilitating recognition of the document;
- clarifying the duties of attorneys; and
- issues for persons interacting with attorneys.

These issues may arise with regards to both enduring and non-enduring or standard powers of attorney, but will arise more frequently, and be more difficult to resolve, where the donor of an enduring power of attorney is no longer capable. Non-recognition of an enduring power of attorney is much more difficult to resolve, for example, where the donor is no longer capable and so cannot create a new document. An attorney’s duties are broadly similar under both standard and enduring powers of attorney, although special duties may arise where the donor of an enduring power of attorney is incapable. The scope and nature of the attorney’s duties, and the importance of the attorney clearly understanding those duties, may be much more important, however, where the donor of an enduring power of attorney is subsequently unable to oversee the way in which that power is exercised. A person dealing with an attorney under a standard power can contact the donor for guidance regarding the propriety of an attorney’s actions, but this will

Consultation Paper on Enduring Powers of Attorney: Areas for Reform

not be possible where the donor of an enduring power is no longer capable (although third parties may also have concerns where the donor of a standard power of attorney cannot be contacted).

II. Facilitating Recognition of the Document

Valid powers of attorney, including enduring powers of attorney, must conform to any formalities required under the statute in the province where the power is created. Those formalities are not uniform, and in some cases significant differences exist. As a result of these differences, it is possible that a power of attorney may not be recognized in a Canadian jurisdiction other than the one in which the document was created, unless inter-provincial recognition is specifically provided for in legislation. Failure to mutually recognize powers of attorney raises the practical problem that people who move between provinces either have to incur the time and expense of having a new legal document prepared or face the risk that the existing document will not be effective. This limitation runs contrary to the current trend which recognizes the importance of inter-provincial mobility.¹ Non-recognition of enduring powers of attorney is especially problematic, as it may not be possible to obtain a new enduring power of attorney (as where the power was created in province A and the donor, now **incapable**, moves to province B).

Legislation in Saskatchewan, Manitoba and Alberta provides that a power of attorney created in another jurisdiction is valid if it is valid in the province of creation (Alberta's legislation applies to enduring powers of attorney only).² There is no equivalent section in British Columbia's power of attorney legislation at present.³

¹ The trend towards reducing barriers to interprovincial mobility is evident in a number of areas, *see* for example the *Agreement on Internal Trade*:
<<http://strategis.ic.gc.ca/epic/internet/inait-aci.nsf/vwGeneratedInterE/Home>>.

² *The Powers of Attorney Act*, R.S.A. 2000, c. P-20 s. 2(5).

³ Power of attorney legislation (including enduring powers of attorney) in British Columbia is currently under review.

Consultation Paper on Enduring Powers of Attorney: Areas for Reform

A uniform recognition section applying to health care directives was developed by the Uniform Law Conference of Canada in 1996, providing that a health care directive made in a jurisdiction other than the enacting jurisdiction would be treated as valid if it met the formal requirements of the jurisdiction in which the directive was made.⁴ The current draft of the *American Uniform Durable Power of Attorney Act*, 2003 Amendments, Article 5, ss. 501-502⁵ (National Conference of Commissioners of Uniform State Laws) combines cross-jurisdictional recognition with a presumption of validity and liability for refusal to accept an agent's authority.

“The provisions of Article 5 are proposed in response to the overwhelming feedback received [during consultation] on the problem of persons who refuse to accept the authority of an agent under a durable power of attorney. Section 501 provides assurance to other persons through a statutory presumption of durable power validity, but in exchange, section 502 (a) imposes liability for refusal to accept an agent's authority. Section 502(b) provides limited bases upon which a person may refuse to accept an agent's authority without incurring liability.”⁶

Even where legislation provides for inter-provincial jurisdiction, formal differences may create practical problems of recognition. A lending institution, for example, may feel unsure about

⁴ Advance Directives in Health Care, ULCC (1996).

Effect of Foreign Directives

2. (1) A health care directive, whether it is made in [enacting jurisdiction] or not, has the same effect as though it were made in accordance with this Act if,
- (a) it meets the formal requirements of this Act; or
 - (b) it was made under and meets the formal requirements established by the legislation of,
 - (i) the jurisdiction where the directive was made, or
 - (ii) the jurisdiction where the person who made the directive was habitually resident at the time the directive was made.

⁵ Article 2, section 203 of that draft provides that “A durable 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.”

⁶ *Uniform Durable Power of Attorney Act*, 2003 Amendments, at 8.

Consultation Paper on Enduring Powers of Attorney: Areas for Reform

whether an unfamiliar power of attorney created in another province was validly created in that province. Establishing validity may involve time, effort and expense that the institution is unwilling to incur.

Formal differences *within* jurisdictions may also create further recognition problems, compounding the inter-jurisdictional recognition issue. Some bodies, such as banks, have created their own standard in-house power of attorney documents that clients must use, and a power of attorney that is not in the required form may not be recognized. This practice can cause real hardship where an attorney needs access to a donor's account in Bank A, but is acting under an (otherwise valid) power of attorney created elsewhere. If the donor is now incapable, it will be impossible to obtain a new power of attorney using Bank A's form.

From the bank's perspective, however, insisting on its own form of power of attorney is attractive given that a number of different forms may be presented as valid powers of attorney. The only way that a bank can be sure it is dealing with a valid form, without wasting valuable time investigating its validity, is to use its own. Different forms pose a problem for banks whether they are created within the province, or whether they were created in another jurisdiction.

The problem of institutional non-recognition may be best addressed through uniform formalities and the use of a widely available but non-mandatory standard "short form." A single mandatory form may be too rigid; one size will not necessarily fit all and individuals may wish to tailor their own document to meet specific needs. The expectation is that widely available standard forms would become commonly used and that alternative forms would be used only in exceptional circumstances. A recommendation to adopt a standard form must also avoid invalidating otherwise adequate existing forms.

Widely used standard forms may encourage institutions to accept powers of attorney created outside of its own process, including powers of attorney created in other jurisdictions. Uniform standard forms would also address the potential danger inherent in a presumption of validity, that third parties will accept out of province documents as valid despite having no knowledge whatsoever of the formalities in the province of origin (increasing the risk that invalid documents

Consultation Paper on Enduring Powers of Attorney: Areas for Reform

will be accepted). A simple “checklist” of elements that must be included in a valid power of attorney and enduring power of attorney is one alternative to a standard “short form” that may be sufficient to accomplish these objectives.

Questions for consultation

1. Should provincial legislation provide for the recognition of powers of attorney created in other provinces?
2. How far should the scope of inter-jurisdictional recognition extend? To other Canadian provinces only? To all other jurisdictions? To Canadian provinces plus a limited list of international jurisdictions? Should the legislation provide that powers of attorney created in international jurisdictions may be recognised, but need not be?
3. Should there be a presumption that powers of attorney created in other jurisdictions are valid? Should the presumption of validity be limited to powers of attorney created in other provinces of Canada?
4. Where the scope of a power of attorney from another jurisdiction is wider than the present provincial jurisdiction allows (as where, for example, the originating jurisdiction allows for personal decision making under a power of attorney and the present jurisdiction does not) should those wider powers be recognised?
5. Should an exception to the presumption be stated in the legislation where a third party has actual knowledge that the document is not valid?
6. Should uniform formalities and a uniform standard short form be adopted?
7. If the answer to 6 is yes, should use of the uniform standard short form be mandatory?

III. Clarifying the Duties of Attorneys

The common law imposes duties and obligations on all attorneys acting under a power of attorney, such as a duty not to act in conflict with the donor's interests and to keep proper records. The general duties of attorneys will apply under enduring and standard powers of attorney, although the special fiduciary relationship created under an enduring power of attorney may give rise to additional special duties.

The duties of attorneys may be broken into three broad categories:

- duties associated with accounting
- a positive duty to act
- the fiduciary duties of the attorney, including:
 - the duty to act honestly, in good faith, and in the best interests of the donor,
 - the duty to act with the standard of care of a prudent person with the attorney's experience and expertise,
 - the duty to act within the authority granted by the power of attorney,
 - the duty to keep proper records,
 - the duty not to benefit personally in carrying out the functions of an attorney,
 - the duty not to mingle donor and attorney property, except where there is already an interest in the same asset,
 - the duty to make full disclosure to the donor of any interests that may conflict with the attorney's responsibilities under the power of attorney,
 - the duty to provide maintenance, education or other benefits for the donor's spouse or dependent children,
 - the duty to take into consideration the wishes of the donor, to the extent possible, in carrying out the attorney's obligations.

Consultation Paper on Enduring Powers of Attorney: Areas for Reform

Concerns have arisen about the improper use by attorneys of enduring powers of attorney.⁷ In some cases this may be the result of attorneys acting outside the scope of their authority with full knowledge that they are doing so. In other cases attorneys may simply not be aware of the legal obligations and restrictions that apply when dealing with the donor's property and financial affairs. This project is primarily concerned with preventing the innocent misuse of powers of attorneys.

A. Duties associated with accounting

A duty to account will provide for some oversight of the attorney's exercise of the power, "catching" incidents of misuse (innocent or otherwise).

All of the Western provinces, with the exception of British Columbia, provide for a duty to account (British Columbia's *Power of Attorney Act*,⁸ currently under review, is silent about the duties and obligations of the attorney). Legislative approaches to the issue of accounts may be summarised as follows:

- duty to keep accounts only (no default duty to provide accounts)
- default duty to submit annual accounts to a "qualified" person, named person, or supervisory body
- default duty to provide accounts on demand to a "qualified" person, named person, or supervisory body

⁷ Some recent examples of cases in which improper use of a power of attorney was alleged include: *Reschetnyk v. Waslyk* (1999), 30 E.T.R. (2d) 278 (Ont. S.C.), in which a power of attorney was used to transfer a mentally incompetent donor's property into the attorney's name where the donor told the attorney he had filled out some paperwork and was concerned the property might be in jeopardy; and, *McNabb Estate v. Mills*, [1995] B.C.J. No. 893 (S.C.), in which the court addressed the attorney's claim that money transferred to the attorney using the power of attorney was a valid gift.

⁸ R.S.B.C. 1996, c. 370.

Consultation Paper on Enduring Powers of Attorney: Areas for Reform

Given that this issue is already dealt with in the provincial legislation (British Columbia apart), what compelling objective would uniformity achieve?

B. Duty to act

Legislating a positive duty to act will prevent “misuse” where an attorney simply declines to act (the consequences of which can be as damaging to the donor as where actual exploitation has occurred). Substantive uniformity on this issue, with the exception of British Columbia, currently exists.

C. Listing the common law and fiduciary duties of the attorney

Attorneys may innocently misuse their powers where they do not know, or sufficiently understand, the nature and scope of those powers. The enduring power of attorney is intended for wide use as a simple and “user friendly” document, and many attorneys receive minimal advice about their duties under the instrument.

It has been suggested that setting out the duties of the attorney in legislation would provide helpful guidance to the non-professional attorney.⁹ This suggestion gives rise to further questions about the content of any statutory “list” of duties, and whether a distinction should be drawn between those duties that may be excluded or varied by the power and those that may not.

The NCCUSL Draft (see Appendix, Article 4) states that the attorney is a fiduciary and lists his or her “basic duties.” Section 402 provides that a donor may provide that the attorney is liable only if he or she acts in “bad faith,” recognizing that a power of attorney relationship between relatives or close friends (the standard arrangement) will often involve “inherent conflicts that do

⁹ McClean, A. J., Review of representation agreements and enduring powers of attorney : undertaken for the Attorney General of the Province of British Columbia, Victoria, B.C. : Policy, Planning and Legislation Branch, Ministry of Attorney General, 2002.

Consultation Paper on Enduring Powers of Attorney: Areas for Reform

not necessarily prevent the [attorney] from acting with reasonable care for the benefit of the [donor].”¹⁰

If the goal is to provide guidance to the non-professional attorney, legislative guidance may be insufficient for the simple reason that few “lay” attorneys will consult the legislation. Three other approaches are possible: explanatory notes setting out duties to be provided to the attorney at the time the document is created (provided for in legislation), or educational materials to be produced and widely distributed with the assistance of the government, but not provided for in legislation. “Best practices” for lawyers creating enduring powers of attorney is a third approach, whereby lawyers would provide both attorneys and donors with information about the duties and responsibilities of attorneys. This approach is currently being developed by the Canadian Bankers Association/Canadian Bar Association Working Group on powers of attorney.

Questions for consultation

8. Is the statement of the duties of an attorney given in Part III of this Paper an accurate and comprehensive description of an attorney’s duties under an enduring power of attorney?
9. Should the donor be able to delete, modify, or add to any or all of the attorney’s duties under an enduring power of attorney?
10. Which of the following methods will most effectively prevent the misuse of enduring powers of attorney:
 - a statutory list of an attorney’s duties? What duties should be included in a statutory list?
 - development of public education materials for potential donors and attorneys?

¹⁰ NCCUSL, *supra* note 6, at 7.

Consultation Paper on Enduring Powers of Attorney: Areas for Reform

- development of “best practices” for lawyers preparing powers of attorney? Should “best practices” also be developed for persons other than lawyers who prepare powers of attorney?

IV. Issues for Persons Interacting with Attorneys

Third parties interacting with attorneys, especially financial institutions, may have concerns about the way in which an enduring power of attorney is being used, whether that apparent misuse is innocent or intentionally exploitative. Where a standard or non-enduring power of attorney is in question, a suspicious third party may simply turn to the donor to verify that the instrument is not being misused. In the case of an enduring power of attorney, however, that option will not be available where the donor is no longer capable.

Financial institutions are concerned about the extent of their own liability, but they also concerned, from a human perspective, about the well being of their clients. Institutions are unsure of their responsibility in situations suggesting misuse, and about the mechanics of how to act on their concerns. Consider the following example: An attorney comes into a bank to “drain” the donor’s account, explaining that the intent is to gift him or her self, qualify the donor for social assistance, and avoid probate. In this situation it is the propriety of the exercise, not the validity of the document, that is in question. Is the bank obligated to follow the attorney’s instructions? Will the bank be liable if it follows the attorney’s instructions in suspicious circumstances? What is the extent, if any, of the bank’s fiduciary duty in this situation? To whom could the bank refer its suspicions? A family member? What if there is no family member identified (other than the attorney)? How does the bank’s concern for/obligation to the donor relate to responsibilities regarding confidentiality? The apparent problem of institutional non-recognition of powers of attorney (see, “Ensuring Validity”) may be in part traceable to concerns about the way in which an enduring power of attorney is being used; in the absence of a clear mechanism for responding to concerns about misuse of the document, institutions may be refusing to carry out transactions on the ostensible basis of concern about the document’s validity.

Consultation Paper on Enduring Powers of Attorney: Areas for Reform

In British Columbia¹¹ a third party may direct concerns to the office of the Public Guardian and Trustee. In Saskatchewan¹² a designated individual or, if no person is named, an adult family member may request an accounting from the attorney. If the attorney does not comply with this request, the designated person, an adult family member, or any “interested person” may request that the Public Guardian and Trustee direct the attorney to make an accounting.

A public reporting scheme involving an official such as the Public Guardian and Trustee (the “PGT”) has clear benefits. Third parties such as banks may feel more comfortable reporting suspicious circumstances to a public officer than to a family member. The PGT will bring its expertise and experience to the over-seer role. These factors are especially important given that the “evidence” of misuse will very often be ambiguous. Despite formal supervisory powers, however, the PGT may be reluctant to become involved where the office is inadequately funded, rendering this mechanism of little practical use. A supervisory role for a “public functionary” such as the PGT was rejected by the Alberta Law Reform Institute in its 2003 Report of Powers of Attorney (Report No. 88, *Enduring Powers of Attorney: Safeguards Against Abuse*) on the grounds of expense and the probable desire of some donors and attorneys to keep their affairs private.

Alberta’s legislation provides that “any interested party” may apply directly to the Court for an order terminating an enduring power of attorney in circumstances where that party has concerns about its misuse.¹³ Manitoba’s legislation also provides that an application made in respect of an enduring power of attorney may be brought before the Court by “an interested person” with the approval of the Court; the Court may make any order it considers appropriate (including advice or directions, an order to remove the attorney, or to vary the powers of attorney).¹⁴

¹¹ *Public Guardian and Trustee Act*, R.S.B.C.1996, c. 383, s. 17.

¹² *Power of Attorney Act*, 2002 S.S. 2002, c. P-20.3, s. 18.

¹³ *The Powers of Attorney Act*, R.S.A. 2000, c. P-20, s. 11.

¹⁴ *Power of Attorney Act*, C.C.S.M, c. P97, s. 24 (orders listed at s. 24(1)).

Saskatchewan’s legislation also permits the party asking for a direction from the Public Guardian

Consultation Paper on Enduring Powers of Attorney: Areas for Reform

Application to the Court is significantly more cumbersome than reporting to a public official such as the PGT and institutional third parties such as banks may be reluctant to proceed in this way, especially where evidence is ambiguous. Institutions may be unable to refer their concerns to a family member who could then take that concern forward; even where an appropriate family member is available concerns about confidentiality may prevent banks from discussing suspicious transactions. A legislated mechanism for reporting to a public official such as the Public Guardian and Trustee may provide for confidentiality concerns by protecting institutions and other third parties from liability for disclosure.¹⁵

Some American states require mandatory reporting of suspected financial abuse; this may be general (everyone must report suspected financial abuse) or limited to individuals in specific situations. Bank personnel are mandatory reporters in three states: Florida, Georgia, and Mississippi. Banks are also required to report abuse in states having universal mandatory reporting laws: Delaware, Indiana, Kentucky, Louisiana, Missouri, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Wyoming. Note that a requirement to report “financial abuse” itself requires a definition of what constitutes “financial abuse”; in many cases, the distinction between abuse, misuse, and, in some circumstances, acceptable use will not be clear without further investigation. Confining investigation to cases of “abuse” requires a front line judgement that will often be impossible to make. Moreover, if the objective is to prevent the improper use of powers of attorney (and not to punish the intent of the “abuser”) confining reporting to abuse may be inadequate. It may be more appropriate within a mandatory reporting scheme to require reporting of all suspected misuse, including (but limited to) “abuse.”

Mandatory reporting has typically been strongly resisted by the banking industry in those states where it has been proposed. Massachusetts and Oregon decided not to proceed with proposed

and Trustee to apply to the court for an accounting where the PGT does not make the direction, or where the attorney continues to refuse to make an accounting despite the PGT’s request.

¹⁵ Adult Protective Services performs this role in the United States.

Consultation Paper on Enduring Powers of Attorney: Areas for Reform

mandatory reporting and developed instead a voluntary reporting approach, including educational programs/services for banking personnel, with the assistance and participation of the banking industry.¹⁶ This compromise – voluntary reporting with the banks’ commitment to develop and participate in the delivery of education and awareness – was endorsed in a 2003 report commissioned by the American Bar Association (“Can Bank Tellers Tell?- Legal Issues Relating to Banks Reporting Financial Abuse of the Elderly”),¹⁷ concluding that effective educational programs were key to preventing power of attorney misuse, with mandatory reporting most useful in terms of persuading banks to participate in those programs.¹⁸

Finally, although the issue of misuse of powers of attorney and the response of third parties in situations suggesting misuse was clearly identified by the CBA/CBA Working Group as the key area of concern, is a uniform approach beneficial on this issue?

¹⁶ Also note, in California, the California Community Partnership for the Prevention of Financial Abuse, online: <<http://www.bewiseonline.org/index.shtml>>.

¹⁷ Sandra L. Hughes, American Bar Association 2003, online: <www.elderabusecenter.org>.

¹⁸ “Enactment of a mandatory reporting law alone does not seem to result in a significant increase in reporting by banks. However, in states that already have mandatory reporting laws in place, the presence of such a law can be helpful in getting the banking industry to support a reporting project. On the other hand, states that have tried to add mandatory reporting laws before initiating a bank reporting project have usually encountered considerable resistance from the industry.

In voluntary reporting states, the absence of mandatory reporting has not been a major obstacle to developing a successful bank reporting project. Although most state bank associations and the banking industry as a whole have opposed mandatory reporting, state bank associations and individual banks have usually been willing, and often enthusiastic, about participating in voluntary bank reporting projects. This suggests that efforts are better directed at securing the co-operation of the banking industry than toward attempting to enact a mandatory reporting law.” *Ibid.*, at 44.

Consultation Paper on Enduring Powers of Attorney: Areas for Reform

Questions for consultation

11. Should a public reporting scheme whereby concerns about the use of an enduring power of attorney are reported to a public officer such as the Public Guardian and Trustee be adopted?
12. If the answer to question 12 is yes, should reporting of abuse/misuse of the enduring power of attorney be mandatory? Should mandatory reporting be universal, or only for “gatekeepers” such as financial institutions?
13. Is a comprehensive voluntary reporting program, to include an educational component, desirable to encourage gatekeepers such as financial institutions to act where circumstances suggest misuse?

V. Conclusion

Enduring powers of attorney are a useful planning tool for many Canadians. Reform initiatives must take into account the need to minimise complexity and costliness, keeping the enduring power of attorney as simple, private and user friendly as possible. At the same time, however, certain issues have arisen with regard to enduring powers of attorney which have negatively affected their usefulness for donors. The first of these is the problem of non-recognition, which may affect all powers of attorney but which is especially problematic for the donor of an enduring power of attorney who is now incapable. Second, misuse may result where an attorney does not understand the scope and nature of an attorney’s duties. Lack of oversight where the donor is incapable increases the likelihood that misuse will go unchecked. Finally, third parties such as banks have indicated their concerns about how to proceed where an attorney’s actions raise concerns about how an enduring power of attorney is being used.

The Western Canada Law Reform Agencies invite your comments on the questions for consultation set out in this Paper, together with any additional suggestions or ideas for addressing these issues.

Consultation Paper on Enduring Powers of Attorney: Areas for Reform

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