POWERS OF ATTORNEY: MOVING TOWARD BEST PRACTICES IN CANADA

by

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INTRODUCTION

More and more Canadians are becoming convinced that they need to have a power of attorney. This development may be the result of self-assessment, or it may be function of the increasing visibility of powers of attorney in articles in the popular press and financial journals. "People have finally caught on to the importance of having a valid will," the website of one investment advisor declares, "[n]ow the push is on to ensure that Canadians also set up another important document called a 'power of attorney.' "[1]

Powers of attorney are among a small group of legal documents that clients feel comfortable to request by name. But this air of certainty can often mask hidden misapprehensions and misunderstandings. Of course, clients really cannot be blamed for any confusion. Anything more than a casual look at the foundations of the power of attorney will reveal that they are shaky. As Dean Falconbridge pointed out long ago, even the name "power of attorney" is a misnomer ". . . because the so-called power is not a power but is merely a manifestation of authority given from [principal] to [agent]."[2] Further, any conceptual justification for treating powers of attorney as being separate from the general law of agency owes its existence more to historical circumstances than to any issues that are relevant to contemporary legal practices.[3]

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1. *See*, online: Investors Group <http://www.investorsgroup.com/english/financial_planning/articles_resources/estate/why_everyone_needs.htm>.

2. John D. Falconbridge, Case Comment on *Sinfra Aktiengesellchaft* v. *Sinfra Ltd.*, [1939] 2 All E.R. 675 (1939) 17 Can. Bar Rev. 672 at 675. The distinction between power and authority is fundamental to the law of agency. *See Restatement, Second, Agency* § 6 ("a power is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act); § 7 ("authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him") (1958).

3. *See* Law Reform Commission of British Columbia, *Report on the Law of Agency: Part II—Powers of Attorney and Mental Incapacity* (LRC 22) (Vancouver: The Commission, 1975) at 5 ("In terms of legal theory, powers of attorney are only one species of a genus of legal relationships known as agencies. Almost without exception the laws which govern

If there is any reason beyond convenience and popular acceptance for discussing powers of attorney as a separate category, it is because a distinct body of law has attached itself to them. This law is found, in part, in statutes. Every province and territory in Canada has legislation touching on powers of attorney. Helpfully, the statute is usually called the *Power of Attorney Act*.[4] There is considerable variety among these statutes.[5] Some Acts are detailed and modern; many others are terse and out-of-date. As a result, it is difficult to make general statements about Canadian statutory law on powers of attorney, except to say this: no *Power of Attorney Act* in Canada tells the entire tale. Some of the law on powers of attorney can only be found in cases. This law may be less well known, and less certain, than the statutory law.

In this paper we will discuss three best practices that lawyers may employ to assist their clients to the fullest extent, especially in light of some developments in the case law. Our focus throughout will largely be on enduring general powers of attorney.

BACKGROUND ON ENDURING POWERS OF ATTORNEY

At common law an attorney's authority terminates when the donor is not mentally capable of managing his or her affairs. This result would often frustrate the intentions and planning of many individuals, who expressly wanted a trusted person to act as their attorney when they were no longer capable to do so. In response to this frustration, the enduring power of attorney was created by statute. The *Power of Attorney Act* of every province and territory in Canada has a provision authorizing the creation of an enduring power of attorney.

The advent of the enduring power of attorney was a welcome development. It has given individuals greater control over planning their affairs as they age. No one would want to go back to the limitations of the common law. But, recently, concerns have been raised about the enduring

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powers of attorney are the same as apply to agency relationships generally. As a result, the legal dimensions and scope of the term 'power of attorney' cannot be ascertained with precision."). *See also* Law Reform Commission of British Columbia, *Report on the Law of Agency: Part I—The Termination of Agencies* (LRC 21) (Vancouver: The Commission, 1975) at 9 ("most lawyers would agree that an agreement or grant which creates or evidences an agency is a power of attorney if it meets the following additional requirements: (a) it is under seal; (b) it is reduced to writing and signed by the principal; (c) it is entitled 'power of attorney' "). Of these three points, item (a) represented the historical rationale for powers of attorney as a distinct category. But the circumstances in which a document is required to have a seal have been greatly reduced by reform legislation. Item (b) does not really distinguish between powers of attorney and other types of agencies, which may also be reduced to writing. Item (c), of course, only relates to the form of the document, not its substance.

4. *See*, *e.g.*, British Columbia: *Power of Attorney Act*, R.S.B.C. 1996, c. 370. Ontario has taken a different approach, including provisions dealing with powers of attorney in a consolidated statute dealing with planning for mental incapacity. *See Substitute Decisions Act, 1992*, S.O. 1992, c. 30.

5. *See* Appendix A, which contains a chart that conveys a sense of the diversity of the legislation in force.

power of attorney. In an ironic turn of events, a tool that can be of tremendous use has, on occasion, revealed itself also to be an instrument of great abuse.[6]

In Canada, significant attention has been given to the issue of abuse of powers of attorney. Organizations such as the Advocacy Centre for the Elderly have worked extensively with community partners such as the Ontario offices of the Public Guardian and Trustee and various police services to warn of both "innocent" misunderstood abuse of a power of attorney, or increasingly commonly, predatory practices in this area. Various financial institutions across the country are paying closer attention to both their responsibilities in this field, as are lawyers and notaries public. Law reform agencies in western Canada have been working closely together since 2004 on the Harmonized Powers of Attorney Project in order to simplify and clarify laws and practices regarding powers of attorney with the end result to be a recommended transferable uniform law for Manitoba, Saskatchewan, Alberta, and British Columbia. One of the central reasons for that law reform work was the pervasive nature of power of attorney abuse in these provinces and across jurisdictional boundaries.

Concerns about abuse of powers of attorney are international in scope. There is a wide body of literature on the subject in the United States and in other common law jurisdictions around the world. Consultations by law reform agencies in other jurisdictions have turned up disturbing examples of such abuse. For instance, the New Zealand Law Commission was informed of the following case in the course of its project on enduring powers of attorney:[7]

> - An elderly woman appointed a daughter as an attorney. The daughter misappropriated $200,000 which she spent on her husband's business, new cars, household expenses, and to fund casino visits.
> - An elderly woman, recently released from hospital[,] was induced by a son (with a solicitor in attendance) to grant an enduring power of attorney in favour of the son. The attorney placed the donor in a rest home and sold the donor's property without informing the donor or other close relatives. The attorney left New Zealand with the proceeds of sale. The donor was alarmed that her house had been sold and had no recollection of granting an enduring power of attorney.

6. *See*, *e.g.*, Carolyn L. Dessin, "Acting as an Agent under a Financial Durable Power of Attorney: An Unscripted Role" (1996) 75 Neb. L. Rev. 574 at 575 ("recently, however, concerns have been voiced that perhaps we have created an instrument of abuse rather than a useful tool").

7. *Misuse of Enduring Powers of Attorney* (NZLC R71) (Wellington: The Commission, 2001) at 34.

- An elderly couple suffering from cognitive impairment and Alzheimers disease appointed one of their children as an attorney. The attorney did not pay the couple's bills, but would write cheques from the donors' accounts for the attorney's own use. In total $18,000 of the donors' money was used for the attorney's own purposes.

In a similar vein, the New York State Law Revision Commission has culled the following instances of abuse from newspaper reports in that state:[8]

- DeWitt police say an assistant bank manager was accused of befriending an 85-year-old customer, persuading the woman to grant her power of attorney and then stealing $93,597.07 of her retirement savings.
- Two New York City women were arraigned yesterday in City Court on charges they stole thousands of dollars from an elderly Ukrainian man living in Syracuse. . . . Court papers indicate the women also had been trying to use power of attorney papers to withdraw more than $300,000 from the victim's account at the Self-Reliance Ukrainian Federal Credit Union.
- The daughter of a retired subway conductor who cashed nearly $35,000 of her dead father's pension cheques [using a power of attorney] has been charged with grand larceny.

For the vast majority of donors, an enduring power of attorney will be an effective planning tool. It will be exercised by a person the donor can trust and in the donor's best interests. But, in the cases where abuse occurs, the result will often be catastrophic for the donor, causing great harm to the donor's financial position and quality of life. The following development of some best practices is offered as a means to reduce the potential of such abuse occurring. Employing them will also help to focus a lawyer's mind on several issues that the courts have identified as being relevant to the creation of a power of attorney. In the main, these issues relate to undue influence and the capacity of the donor.

WHY "MOVING TOWARD" BEST PRACTICES?

The various provincial laws of powers of attorney are currently in a state of flux, across the country. This is an area of active law reform. As such, a complete list of best practices and ethical obligations is premature. What may be helpful, however, is to commence generation of some underlying

8. *Report on Proposed Revisions to the General Obligations Law in Relation to Powers of Attorney* (Albany, NY: The Commission, 2003) at 24–25 [footnotes omitted; ellipses and bracketed text in original].

keystone practices for lawyers when working in this area. We have identified three such areas. They are not, in any way, a complete list, nor should be taken as an exhaustive analysis. Rather, they represent a building process to a more complete national perspective to lawyer's obligations.

THREE BEST PRACTICES IDENTIFIED

(1) Meet with your client alone

In many cases, a person will want to grant a power of attorney to a family member. It may only seem natural for this person and his or her spouse or child to all come together to meet with the lawyer about the power of attorney. It is precisely in these circumstances that a lawyer should remember the old adage to *know your client*.

In some respects, preparing powers of attorney for family members is analogous to preparing "mirror" wills for a couple. In the latter case, there is a well-developed convention of clearing a little time during the meeting—usually just before when the testator is about to sign the will—for the client to be alone with the lawyer. It would be helpful, at least, if such a convention were adopted for powers of attorney as well. It would be considerably better practice though, to take instructions and to give advice *alone with the donor*.

The dynamics of family or caregiver relationships are complex and in many cases weighted with years of history that the lawyer may not know. In cases of older adults, the younger relative or caregiver may incorrectly be seen as the best person for the lawyer to communicate with. This ageist response does not only a great disservice to the older client, but also arguably breaches the lawyer's ethical obligations. The lawyer must be particularly alive to the possibility of undue influence, hidden violence, or abuse.

Additionally, by ensuring that a lawyer meets with a client alone, force of personality may be reduced. In a complex family or caregiving situation, a shy or withdrawn adult may feel overwhelmed by the forceful suggestions of a relative or friend that they get their power of attorney in order. Only by taking the time to ensure that the person giving the attorney is doing so for clear purposes, without undue influence or abuse, can the lawyer ensure best practice.

Indeed, a number of recent practice manuals stress the problems that can result when a lawyer does not meet alone with the donor.[9] One particularly striking example of these problems can

9. *See*, *e.g.*, Philip J. Renaud, "Taking Instructions," in Legal Education Society of Alberta, *Enduring Powers of Attorney, Dependent Adults, Living Wills* (Edmonton: Legal Education Society of Alberta, 1991) at 146; Jasmine M. Sweatman, *Guide to Powers of Attorney* (Toronto: Canada Law Book, 2002) at 178.

be found in *Danchuck* v. *Calderwood*.[10] In *Danchuck* the donor was an elderly man who had fallen under the undue sway of a younger woman who had been hired by his family to provide him with live-in care. The relationship of the donor with his children deteriorated as he emotionally moved closer to the caregiver. Ultimately, the caregiver convinced him to change his will and to grant her a power of attorney. The pair met with a lawyer for this purpose. During the meeting, the lawyer noticed that the caregiver was doing all the talking and made a tentative inquiry of the donor to see if he was understanding the lawyer's advice.[11] The donor made an affirmative gesture, and the caregiver remarked that ". . . she could speak for him."[12] The interview continued, and the lawyer prepared the documents in accordance with the caregiver's instructions.[13]

A short time after the interview, the donor died and the caregiver commenced an action to prove the will in solemn form. The donor's family resisted, arguing that the donor lacked the capacity to make a will, or, in the alternative, that the caregiver had unduly influenced the donor in the making of the will. The lawyer was called to give evidence. The court was scathing in its assessment of the lawyer's conduct:[14]

> In keeping with what I understand the law applicable to the duty of a solicitor, in the circumstances here . . . [the lawyer] failed with respect to that duty.
>
> In my view, in the particular circumstances here, at the outset . . . [the lawyer] should have undertaken an inquiry, including interviewing the [caregiver] and the [donor] separately with regard to the age difference and as to the independence of the [donor] in giving instructions. . . .
>
> In this perspective, I understand the law to be that a solicitor does not discharge her duty in the particular circumstances here simply be taking down and giving expression to the words of the client with the inquiry being limited to asking the [donor] if he understands the words. Further, I understand it to be an error to suppose because a person says he understands a question put to him and gives a rational answer he is of sound mind. . . .
>
> If the solicitor had made such inquiry and had been made aware of the circumstances in a fuller sense . . . I am satisfied the said will would not have been prepared by her at that time.
>
> For these reasons, I attach little weight to the testimony of the solicitor.

10. (1997), 15 E.T.R. (2d) 193 (B.C.S.C.).
11. *Ibid.* at para. 71.
12. *Ibid.*
13. *Ibid.* at para. 72.
14. *Ibid.* at paras. 116–20.

These remarks tie together two issues that underscore the importance taking some time to meet alone with a client who wants a power of attorney. Although it is possible for a person to wield undue influence without being physically present, in most cases simply removing the donor from an abuser's or potential abuser's will be an effective safeguard against undue influence. But even in cases where abuse is not an issue, capacity may be. As *Danchuk* illustrates, making a proper assessment of capacity may not be possible if others are present at the meeting.[15]

(2) Explain the nature and scope of the authority granted under the power of attorney

In most cases, a general power of attorney will be created by in a document that merely provides that the attorney may do anything on the donor's behalf that the donor can lawfully do by attorney. Similarly, an enduring power of attorney may be made by including a simple declaration to that effect in the document.

The simplicity of these documents is the direct result of statutory reforms. At common law, the authority granted to an attorney was strictly construed. Powers of attorney had to be carefully and laboriously drafted to capture every nuance and contingency. And, as noted above, it was not possible to create an enduring power of attorney at common law.

These reforms have conferred numerous benefits. But they have also opened up risks that may not be readily apparent to donors. In particular, a donor's preconceived notions could lead to confusion about the scope of an attorney's authority and the time that an enduring power of attorney comes into effect.

A general power of attorney grants a vast authority to the attorney. The American Law Institute's *Restatement of the Law of Agency* contains a good general description of this authority, describing it as ". . . the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to [the agent]."[16] The key phrase in this sentence is "affect the legal relations of the principal."

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15. A further subsidiary benefit may be obtained by meeting alone with your client. After the power of attorney has been created and has taken effect the attorney will, from time to time, contact the lawyer seeking legal advice on the scope of the attorney's authority and obligations. There is no inherent harm in answering such questions, except that it could develop from a situation where you are providing advice to further your the donor's best interests to one where you are implicitly—or even explicitly—acting for the attorney. If this development should occur, awkward questions about conflicts of interest could follow. Meeting alone with the donor will send a clear signal at the start of the relationship as to who your client is. *See generally* Ellen J. Henningsen, "Preventing Financial Abuse by Agents Under Powers of Attorney" *Wisconsin Lawyer* (Sept. 2000) 25 at 77.

16. *Supra* note 2 at § 7.

It is widely appreciated that one of the ways in which an attorney may affect the donor's legal relations is by dealing with the donor's property. In order to make this authority concrete, it is useful to review with the client the major assets held by the client. In the course of this review, the lawyer may observe how the attorney may affect specific items of property—for example, by selling or charging land, or by depositing, withdrawing, or transferring funds to or from a bank account.

But, as is implied in the phrase affect the donor's legal relations, the authority under a general power of attorney does not stop at dealing with property currently owned by the donor. The attorney's authority will extend into other areas, such as borrowing funds, compromising debts and claims, and commencing, maintaining, or defending lawsuits. The donor should be made aware of the steps an attorney may take in this regard, as they may not be uppermost in the donor's contemplation.

The donor should also be given a sense of the limits of a general power of attorney. The common law imposes a few restrictions on the scope of the attorney's authority. An attorney may not make a will for a donor. One case has held that this rule applies to one type of will substitute—a beneficiary designation under a registered retirement savings plan.[17] An attorney is not authorized to make gifts on the donor's behalf. The attorney's fiduciary duties restrain any self-dealing. And, of course, the attorney may not do anything that the donor would not be legally entitled to do.

It is also important to discuss timing with the donor. Many donors are unaware that an enduring general power of attorney will take effect immediately upon its being signed. Some donors may hold the mistaken view that the attorney's authority only commences upon the donor's incapacity; others may have a hazy sense that some further action, such as giving consent, is necessary in each case to authorize the attorney to act. Conversely, some donors may not fully grasp the implications of an attorney's continuing authority while the donor is incapable, including the fact

17. *Desharnais* v. *Toronto Dominion Bank* (2001), 42 E.T.R. (2d) 192, 2001 BCSC 1695, *aff'd on other grounds* (2002), 9 B.C.L.R. (4th) 236, 2002 BCCA 640. Note that British Columbia's legislation governing retirement plan beneficiary designations dates from the 1950s and has remained essentially the same since its enactment. (The only notable change has been to extend the basic provisions to cover new developments in the area, such as RRSPs and RRIFs.) It is an open question whether the reasoning in *Desharnais* would be applied in a jurisdiction such as Ontario, which has more modern legislation governing retirement plan beneficiary designations. But, apparently there is still academic debate in Ontario about whether the essential nature of these designations is testamentary or contractual. *See* Ralph E. Scane, "Non-Insurance Beneficiary Designations" (1993) 72 Can. Bar Rev. 178; Anne Werker, "Non-Insurance RRSP Designations—Testamentary Dispositions of Property that Do Not Form Part of the Estate?" (2003) 22 Est. & Tr. J. 103. *Quare* also whether the reasoning in *Desharnais* could apply to other types of designations, such as a beneficiary designation under a life insurance policy. A textbook on life insurance law says that statutory reforms have caused life insurance beneficiary designations to be "accepted as a contractual disposition," but allows that they also "certainly [contain] the elements of a testamentary disposition." *See* David Norwood & John P. Weir, *Norwood on Life Insurance Law in Canada*, 3d ed. (Toronto: Carswell, 2002) at 291–92.

that the donor will not be able to revoke the power of attorney while the donor is incapable. This point should be drawn to the donor's attention, noting at the same time any statutory protective measures that may exist in the jurisdiction.

The importance of taking the time to discuss the attorney's authority fully and specifically in relation to items of property and other steps that may affect a donor's legal position is amplified when the donor's capacity to grant a power of attorney may be at issue. Although this area of the law is evolving, the courts appear to be coming to rest on the position that the test of capacity for granting a power of attorney is not identical to the test for making a will. Rather, it is simply the test for entering into a contract, which, in basic terms, requires a party to understand the terms of a contract. In *Godelie* v. *Pauli (Committee of)*[18] the court set out a helpful list of criteria to aid in applying the contractual test when a power of attorney is at issue:[19]

> (1) An appreciation that the document authorizes the [attorney] to exercise all the powers of the donor that the donor can himself exercise with respect to the matters set forth in the terms of the document, unless and until the document is revoked or otherwise terminated.
>
> (2) An appreciation that the all-embracing terms of the document give to the [attorney] power to deal with everything that the donor owns and with respect to the total financial affairs of the [attorney].
>
> (3) An appreciation by the donor of the nature and extent of his property and financial affairs, as they exist at the time of the execution of the document, over which the attorney will be entitled to assume control. . . .
>
> I would [also] have added the requirement that the donor understand that his right to revoke the power is lost in the event that legal incapacity intervenes while the power is still extent, and that the power will likely continue (absent recovery of legal capacity) until death.

These remarks do not, in and of themselves, set in stone a test for capacity to grant a power of attorney that has to be applied in all cases. Indeed, other cases have discussed the contractual test of capacity as applied to powers of attorney in somewhat different terms.[20] But the court's observations

18. (1990), 39 E.T.R. 40 (Ont. Dist. Ct.).

19. *Ibid.* at paras. 25–26.

20. *See*, *e.g.*, *British Columbia (Public Guardian and Trustee)* v. *Egli* (2004), 28 B.C.L.R. (4th) 375, 2004 BCSC 529, *aff'd* (2005), 48 B.C.L.R. (4th) 90, 2005 BCCA 627. Both *Godelie* and *Egli* draw on an English decision: *Re K*, [1988] 1 All E.R. 358 (Ch.D.).

in *Godelie* are a helpful reminder of what should be discussed with a client. They may serve as a useful guide even when capacity is not an issue.

(3) Explain other types of powers of attorney and instruments available in your jurisdiction

A review of the donor's financial position and of the nature and scope of a general enduring power of attorney may lead into a discussion of *other options available to a donor*. If the donor is leery of granting the wide-ranging authority that is contained in a general power of attorney, then a limited power of attorney may be a better choice. A limited power of attorney can be crafted to apply to the donor's specific circumstances and finely tuned to encompass only those items of property or potential transactions that a donor foresees as being relevant in the future. But the disadvantages of a limited power of attorney should also be kept in mind. Drafting a limited power of attorney is more labour-intensive and time-consuming than drafting a general power of attorney. Limited powers of attorney are also less flexible. An unforeseen circumstance may greatly reduce the utility of a limited power of attorney, or even eliminate it altogether, requiring the drafting of a new document. And if this unforeseen circumstance should occur when the donor is mentally incapable, then he or she will be unable to grant a new power of attorney to cover the unforeseen event.

Another option would be to explore arrangements that do not involve a power of attorney at all. For instance, if it is discovered that a client is only concerned with the operation of an account, then the financial institution may have other instruments or procedures that will fulfil the needs of the client. Of course, this approach has the same drawbacks as a limited power of attorney, to an even greater degree.

If timing is a concern for a donor, then a power of attorney that does not take effect until a determination of mental incapacity (or some other future event) may be an answer. Such a power of attorney is commonly referred to as a "springing" power of attorney. A springing power of attorney has the considerable advantage of allowing for a plan for future incapacity without the need to relinquish any control over financial affairs while the donor is capable. In order to achieve this balance, however, the trigger that causes the power of attorney to spring into force must be drafted with great care. If the trigger is too vague, or if it fails to address a future contingency, then the power of attorney will fail to come into force. This may set the donor's planning back, or, if the donor has become incapable, may undo any planning entirely. Another danger lurking here is in the law that supports springing powers of attorney. Most jurisdictions in Canada have enacted legislation

that expressly authorizes the creation of springing powers of attorney.[21] But a few still do not have such enabling legislation. British Columbia, for example, does not have any legislation enabling the creation of springing powers of attorney. The law in this province went through a period of uncertainty after a Supreme Court decision held that a springing power of attorney was invalid, at least in connection with dealings in land.[22] The decision was eventually reversed on appeal,[23] but the episode served to underscore how vulnerable springing powers of attorney are in the absence of express statutory authorization.

Finally, it should be recalled that clients seeking legal advice on commercial matters are often presented with the option of doing nothing. In this context, taking no planning steps would leave open the possibility of needing a court order to empower another person to manage the client's affairs if the client should become incapable.[24] In the overwhelming majority of cases this result would be unfortunate, given the cost of a court application, the publicity attendant upon it, and the cumbersome procedures mandated under such orders. But there may be unusual cases where a client does not appreciate that a statutory system exists to cover this contingency, and may wish to give it some thought.

CONCLUSION

The potential for abuse under an enduring general power of attorney is high. When that abuse does occur, the consequences are often drastic. Yet, it cannot be denied that most individuals will benefit from taking steps to plan for incapacity, including the granting of an enduring general power of attorney. And, in the vast majority of cases, the attorney turns out to be a trustworthy individual, who uses the authority granted under the power of attorney in a manner that advances the best interests of the donor. In recent years, legislatures across Canada have begun to take steps to reform the legislation governing powers of attorney. Their goal is often to extend safeguards against the potential for abuse without unduly complicating the simple, certain virtues of the power of attorney. This is a very difficult balance to strike, as it implicitly requires that a wide variety of differing

21. *See*, *e.g.*, Alberta: *Powers of Attorney Act*, R.S.A. 2000, c. P-20, section 2; Manitoba: *The Powers of Attorney Act*, C.C.S.M. c. P97, section 6.9

22. *Parnall* v. *British Columbia* (2002), 45 E.T.R. (2d) 140, 2002 BCSC 599.

23. *Parnall (Attorney for)* v. *British Columbia (Registrar of Land Titles)* (2004), 236 D.L.R. (4th) 433, 2004 BCCA 100.

24. *See*, *e.g.*, British Columbia: *Patients Property Act*, R.S.B.C. 1996, c. 349 ("committeeship"). A discussion of the legislation in force across Canada governing this issue is beyond the scope of this paper.

individuals and circumstance be treated, at least at one level, as being the same. As a result, legislative reforms in this area have come slow, if at all. And the law is beginning to show some uncertainty, in the absence of these reforms.

The three best practices we have discussed in this paper provide one way to assist clients in evaluating the potential for abuse and the uncertainties in the law. We believe that lawyers who follow them will be assisted in providing helpful advice, crafted to a client's needs and circumstances. These best practices highlight the advantages and some of the hidden dangers in granting an enduring general power of attorney for the client. In many cases, you may find that for your clients there will be a ring of truth to the cliché, forewarned is forearmed.

APPENDIX A

Power of Attorney Legislation in Canada

Jurisdiction	Types Available	Execution Requirements	Professional Advice Required?	Registry?	Pending Legislative Changes	Extra-territorial Recognition?	Extras
British Columbia ***Power of Attorney Act* R.S.B.C. 1996, c. 370**	-general -enduring (s. 8) -(springing POA's are not statutory in BC. They do exist at common law: see *Parnall (Attorney of) v. BC (Registrar of Land Titles),* BCCA	-Every POA must be signed by the donor and one witness (ss. 8(1)(b) and 9). There are no requirements for the witness. - An enduring POA must provide that it will continue if the donor becomes mentally incapacitated (s. 8(1)(b)).	No. Neither a lawyer nor notary is required to make a POA.	A registry exists at www.rarc.ca, but registration is simply voluntary, not mandatory. There is a small one-time cost associated with it.	The proposed Bill 32 contains changes to the Power of Attorney Act: expansion of enduring POA's, creation of statutory springing POA's, and changes to the *Representation Agreement Act* make POA's the sole planning instrument for major financial decisions. However, it was not passed in the Spring 2006 session, and will not be considered again until at least Fall 2006.	No.	There are two schedules in the statute, prescribed Forms 1 and 2 (part of s. 9). Form 1 provides for the appointment of one attorney, and Form 2 provides for the appointment of more than one attorney.
Alberta ***Powers of Attorney Act* R.S.A. 2000, c. P-20**	-general -enduring (s. 2) -springing (ss. 2 and 5)	-Enduring POA's must be signed by the donor and one witness. The witness must not be the attorney, spouse of the attorney or donor, or a person signing on behalf of the donor or attorney (ss. 2(1) and 2(4)). -The donor and attorney must be adults (ss. 2(1) and 2(2)). - An enduring POA must provide that it will continue if the donor becomes mentally incapacitated or that	No. Neither a lawyer nor notary is required to make a POA.	No.	None.	An enduring POA is valid in Alberta if it is valid in the place of its execution (s. 2(5)).	- The attorney must provide accounts in relation to transactions in pursuance of an enduring POA, on the demand of the donor or an interested person (s. 10). -An EPA is void if the donor was mentally incapable of understanding the nature and effect of the EPA at the time of its execution (s. 3). -Springing POA's are a type of enduring POA. -There is no

Jurisdiction	Types Available	Execution Requirements	Professional Advice Required?	Registry?	Pending Legislative Changes	Extra-territorial Recognition?	Extras
Alberta— ***continued***		it comes into effect upon a specified contingency (ss. 2(1)(b)(iii)(A) and (B)).					prescribed form.
Saskatchewan ***The Powers of Attorney Act*** **S.S. 2002, c. P-20.3**	-general -enduring (s. 3) -springing (s. 9)	-An enduring POA must be signed by the donor and by either one lawyer or two adults. If the donor chooses a lawyer, the enduring POA must be accompanied by legal advice and a witness certificate in the prescribed form. The witnesses must be mentally capable adults who are not the attorney or family members of either the attorney or donor, and the enduring POA must be accompanied by witness certificates in the prescribed form (s. 12). -There are detailed limitations on who may act as attorney: the attorney must not be an undischarged bankrupt (s. 6(1)(a)(ii)) or have been convicted of a violent crime within the last 10 years s. 6(1)(a)(iii)), unless the donor provides	-While professional advice is not necessarily required, the witness must be either a lawyer or 2 adults. In the case of a lawyer, they must also provide legal advice (s. 12).	No.	None.	An enduring POA is valid in Saskatchewan if it is valid in the place of its execution, and provides for continuance in the face of the donor's incapacity, or provides that the POA comes into effect on a future date or specified contingency (s. 13).	-'Grantor' not 'donor' -Springing powers of attorney are called 'contingent appointment.' -The attorney must provide accounts in relation to any transactions pursuant to an enduring POA, upon request of the donor. If the donor is incapacitated, upon request of a person named in the enduring POA or an adult family member of the donor, or another (s. 18(2)). The above named people or an interested person may ask the PGT to direct the attorney to provide accounts (ss. 18(3) and (4)). There is also recourse to the courts by the donor or the above-mentioned persons, if the attorney does not provide accounts (s. 18(6)). -S. 4 provides that

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Saskatchewan— ***Continued***		written acknowledgement and consent (s. 6(2)). - An enduring POA must provide that it will either continue if the donor becomes mentally incapacitated (s. 3), or that it comes into effect on a specified contingency (s. 9).					any adult who has the capacity to understand the nature and effect of an enduring POA may grant an enduring POA, however there is no provision voiding the POA if the donor lacked such capacity. -If a form for enduring POA's is prescribed, the use of that form is not mandatory (s. 5). -In the regulations to the Act (*Powers of Attorney Regulations*, R.R.S. c. P-20.3 Reg. 1), there is a form for appointing an enduring POA (Form A), a legal advice and witness certificate (Form D), a non-lawyer witness certificate (Form E), a form for accounting (Form H), and explanatory notes (Appendix) for the assistance of the donor in granting an enduring POA. The use of the notes and prescribed forms is not mandatory (s. 5 of the Act), apart from the legal

Jurisdiction	Types Available	Execution Requirements	Professional Advice Required?	Registry?	Pending Legislative Changes	Extra-territorial Recognition?	Extras
Saskatchewan— *Continued*							advice and witness forms (D and E), which *must* be used to grant a valid enduring POA. Form H is a guide to preparing an accounting for an attorney.
Manitoba *The Powers of Attorney Act* **C.C.S.M., c. P97**	-general -enduring (s. 10) -springing (s. 6)	-Enduring POA's must be signed by the donor and one witness (s. 19(1)(c)). The witness must be a Judge, police officer, doctor, lawyer, notary, or person qualified to solemnize marriages (s 11(1)). The witness cannot be the attorney or their spouse (s. 11(2)). -The attorney must not be an undischarged bankrupt (s. 16). - An enduring POA must provide that it will continue if the donor becomes mentally incapacitated (s. 10(1)(a)).	No. Neither a lawyer nor notary is required to make a POA.	A donor or attorney *may* file a copy of the enduring POA with the Public Trustee (s. 12).	None.	An enduring POA is valid in Manitoba if it is valid in the place of its execution, and provides for continuance even if the donor becomes incapacitated (s. 25).	-There is a duty on the attorney to provide accounts in relation to any transactions pursuant to an enduring POA transactions, if demanded by a recipient of an enduring POA. If there is no recipient, or if the recipient is the attorney, their spouse, or is incapable, then the attorney must provide accounts annually to the donor's nearest relative (s. 22(1)). - An enduring POA is void if the donor was mentally incapable of understanding the nature and effect of the enduring POA at the time of its execution (s. 10(3)). -There is no prescribed form.

Jurisdiction	Types Available	Execution Requirements	Professional Advice Required?	Registry?	Pending Legislative Changes	Extra-territorial Recognition?	Extras
Ontario ***Substitute Decisions Act*** **S.O. 1992, c. 30**	-general -enduring (s. 7) -springing (s. 7(7))	-An enduring POA must be signed by the donor and two adult witnesses (s. 10(1)). The witnesses must not be the attorney, their spouse, the donor's spouse or child, or a person whose person or property is under guardianship (s. 10(2)). - An enduring POA must provide that it will either continue if the donor becomes mentally incapacitated (s. 7(1)), or that it comes into effect on a specified contingency (s. 7(7)).	No. Neither a lawyer nor a notary is required to make a POA.	No.	None.	An enduring POA is valid in Ontario if it is valid in the place of its execution, the place the donor was domiciled, or the place the donor had his or her habitual residence (s. 85(1)).	-'Continuing' not 'enduring' -'Grantor' not 'donor' -Although s. 8(1) includes requirements the donor must meet in order to have the capacity to give an enduring POA, there is no provision voiding the POA if the donor lacked such capacity. -An attorney or grantor may apply to pass the attorney's accounts in relation to transactions pursuant to an enduring POA (s. 42(2), and s. 42(4)) provides a list of other persons qualified to apply. -Springing POA's are a type of enduring POA's. -In the regulations of the Act (O.Reg. 100/96), there is a list of required items that the attorney's accounts (s. 2) and records (s. 3) shall include. S. 5 of the regulations also provides instructions concerning the

Jurisdiction	Types Available	Execution Requirements	Professional Advice Required?	Registry?	Pending Legislative Changes	Extra-territorial Recognition?	Extras
Ontario— *continued*							disclosure of accounts: the attorney must only provide accounts and records to the donor or their attorney for personal care or guardian, or as required by the court.
New Brunswick *Property Act* **R.S.N.B. 1973, c. P-19**	-general -enduring (s. 58.2(1)	-An enduring POA must be signed by the donor and witnessed by any adult person (s. 58.2(1)(c)). - An enduring POA must provide that it will continue if the donor becomes mentally incapacitated (s. 58.2(1)(a)).	No. Neither a lawyer nor a notary is required to make a POA.	A POA that describes registered land by its approved parcel identifier *may* be registered as to that land (*Land Title Act*, S.N.B. 1981, c. L-1.1, s. 47(1)).	None.	No.	-If the donor is mentally incapable, an interested party can apply to the court for an order requiring the attorney to pass accounts in relation to transactions pursuant to an enduring POA (s. 58.5(1)). -There is no prescribed form.
Prince Edward Island *Powers of Attorney Act* **R.S.P.E.I. 1988, C. P-16**	-general -enduring (s. 5)	-An enduring POA must be signed by the donor in the presence of one witness. The witness must not be the attorney or their spouse (s. 6). - An enduring POA must provide that it will continue if the donor becomes mentally incapacitated (s. 5).	No. Neither a lawyer nor a notary is required to make a POA.	No.	None.	No.	-There is a schedule in the statute, Form 1, which is sufficient authority to grant a POA. However, the legislation does not indicate that it is mandatory to use this form. -If the donor becomes incapacitated, any interested person may apply to the court to order the attorney to pass accounts for

Jurisdiction	Types Available	Execution Requirements	Professional Advice Required?	Registry?	Pending Legislative Changes	Extra-territorial Recognition?	Extras
Prince Edward Island— ***Continued***							transactions made during the donor's incapacity (s. 9(1)).
Nova Scotia ***Powers of Attorney Act*** **R.S.N.S. 1989, c. 352**	-general -enduring (s. 3)	-An enduring POA must be signed by the donor and must have one witness. The witness must not be the attorney or their spouse (s. 3). - An enduring POA must provide that it will continue if the donor becomes mentally incapacitated (s. 3).	No. Neither a lawyer nor a notary is required to make a POA.	No.	None.	No.	-The attorney is required to pass accounts in relation to transactions pursuant to an enduring POA upon request of a judge (s. 5(1)(a) or donor (s. 5(5)). -There is no prescribed form.
Newfoundland and Labrador ***Enduring Powers of Attorney Act*** **R.S.N.L. 1990, c. E-11**	-general -enduring (s. 3)	-An enduring POA must be signed by the donor, in the presence of one witness. The witness must not be the attorney or their spouse (s. 3(1)). -An enduring POA must provide that it will continue if the donor becomes mentally incapacitated (s. 3(1).	No. Neither a lawyer nor a notary is required to make a POA.	No.	None.	No.	-If the donor becomes incapacitated, any interested person may apply to the court to order the attorney to submit accounts for any transactions involving the donor's estate (s. 10(1)). -There is no prescribed form.
Yukon ***Enduring Power of Attorney Act*** **R.S.Y. 2002, c. 73**	-general -enduring (s. 3) -springing (s. 6)	-An enduring POA must provide that it will continue if the donor becomes incapacitated (s. 3(1)(A)). -An enduring POA must contain the explanatory notes	Yes. A certificate of legal advice must accompany an enduring POA, for it to be valid (s. 3(1)(b)(iv)). The certificate must guarantee, among other things, that	No.	None.	An enduring POA is valid in the Yukon if it is valid in the place of its execution, and if it states that the attorney's authority continues despite mental incapacity or	-An enduring POA is void if the donor was mentally incapable of understanding the nature and effect of the enduring POA at the time of its execution (s. 4).

Jurisdiction	Types Available	Execution Requirements	Professional Advice Required?	Registry?	Pending Legislative Changes	Extra-territorial Recognition?	Extras
Yukon—*continued*		that are in the Schedule to the Act (3(1)(b)(iii)). -An enduring POA must be signed by the donor and contain a certificate of legal advice, signed by a lawyer who is neither the attorney nor the attorney's spouse (3(1)(b)(iv)). -The attorney must acknowledge in writing that they are aware of the responsibilities of acting as an attorney under the Act (3(1)(c)(2)).	the donor appeared to understand the nature and effect of the document, appeared to give the enduring POA freely, and that the donor understood the explanatory notes in the schedule of the Act (s. 3(4)).			infirmity of the donor (s. 5).	-There is a duty on the attorney to keep accounts. An application may be made to the court to pass accounts, by the donor or if they are incapacitated, by any interested party (s. 11). -Springing POA's are a type of enduring POA. -There is no prescribed form.
Northwest Territories **Powers of Attorney Act S.N.W.T. 2001, c. 15**	-general (Part 1) -enduring (Part 2) -springing (Part 3)	-An enduring POA or springing POA must be signed by the donor and one witness (ss. 13(1)(c) and (d)). However, there are no requirements as to the identity of the witness. -An enduring POA must provide that it comes into force on a specified date or a specified contingency or that it will continue if the donor becomes incapacitated (ss. 13(1)(e)(i) and (ii)).	No. Neither a lawyer nor a notary is required to make a POA.	The donor or attorney *may* file a copy of a springing or enduring POA with the Public Trustee (s. 15).	None.	An enduring or springing POA is valid in the Northwest Territories if it is valid according to the place it is valid in the place of its execution and if it includes appropriate statements as to its commencement or continuation (s. 25).	-An enduring POA is void if the donor was mentally incapable of understanding the nature and effect of the EPA at the time of its execution (s. 13(3)). -The attorney must provide accounting on the demand of a person named as recipient of accounting by the enduring or springing POA (s. 23(1)). If there is no named recipient, or the named recipient is the attorney or their spouse, is

Jurisdiction	Types Available	Execution Requirements	Professional Advice Required?	Registry?	Pending Legislative Changes	Extra-territorial Recognition?	Extras
Northwest Territories— ***continued***							deceased, or is mentally incapable, the attorney must provide an annual accounting to the donor's nearest relative (s. 23(2)). -The regulations to this act (*Powers of Attorney Regulations*, N.W.T. Reg. 027-2002) contain prescribed forms within Schedule A for springing (Form 1) and enduring POA's (Form 2). The use of these forms is not mandatory. The forms also provide explanatory notes for the assistance of the donor. However, Schedule B lists the information that *must* be used when making an enduring or springing POA.
Nunavut ***Powers of Attorney Act*** **S.N. 2005, c. 9**	-general -enduring (ss. 8-9) -springing (ss. 2-7)	-An enduring or springing POA must be signed by the donor and one witness in the presence of each other (ss. 10(1)(c) and (d)). -Neither the attorney or their spouse are eligible to be the witness (s.	No. Neither a lawyer nor a notary is required to make a POA.	The donor or attorney *may* file an original or copy of an enduring or springing POA with the Public Trustee, who shall establish and maintain a register and provide access and certified copies of POA's (s. 14(1) and 14)2)).	None.	An enduring or springing POA is valid in Nunavut if it is valid in the place of its execution, and if it includes appropriate statements as to its commencement or continuation (s. 26).	-An enduring POA is void if the donor was mentally incapable of understanding the nature and effect of the EPA at the time of its execution. There is also a list of particular matters that the donor should be able to

Jurisdiction	Types Available	Execution Requirements	Professional Advice Required?	Registry?	Pending Legislative Changes	Extra-territorial Recognition?	Extras
Nunavut— ***continued***		11). -Must provide that it comes into force on a specified date or a specified contingency or that it will continue if the donor becomes incapacitated (ss. 10(1)(e)(i) and (ii)).					understand the nature and effect of (s. 10(3)). -The attorney must provide accounting on the demand of any person named as a recipient of an accounting by the donor in an enduring or springing POA (s. 25(1)). The Public Trustee may also direct an attorney to provide accounting (s. 25(2)). -There is no prescribed form.