

# Incapacity Planning in a Mobile World

June 2021

The pandemic notwithstanding, our population is getting older and travelling more than ever before. Whether you travel for work, own property in another jurisdiction, or are considering a move away from your home province or territory, specialized planning will help ensure that your assets, as well as personal and health care decision making, are properly managed should you become incapable of making decisions while outside your home province or territory.

In many jurisdictions, “planning for incapacity” takes the form of executing powers of attorney (or the local equivalent) while capable to protect you in the event that you lose the ability to manage your affairs. In Canada, there are different documents that can be signed for substitute decision-making of both property and personal/health care decisions.

Similar to Wills dealing with assets in external jurisdictions, “multijurisdictional incapacity planning” is handled in one of two ways:

- i. Using powers of attorney/directives from your home province or territory in another jurisdiction.
- ii. Preparing separate powers of attorney in each jurisdiction, also known as separate “situs” powers of attorney.

In Canada there is no unified standard for the form, validity or execution of powers of attorney or directives. These documents are governed by provincial or territorial legislation, with significant differences in the document titles and requirements for validity of execution (including legislated tests for capacity and age of the person giving the power of attorney, known as a “grantor”).

## Recognition across jurisdictions is inconsistent

Powers of attorney and health care directives from other jurisdictions may be recognized in some provinces and territories, but the relevant legislation across Canada is inconsistent and can be difficult to navigate. Consider the following:

- In Ontario, powers of attorney for both property and personal care issues from other jurisdictions will be recognized if they were validly executed in the jurisdiction where they were drafted or where the grantor was domiciled or habitually a resident.
- In Quebec, powers of attorney from other jurisdictions may be recognized after a court process termed “homologation” occurs.

- In British Columbia, powers of attorney may be “deemed” valid if properly made by a person who was, at the time of making, ordinarily resident outside the province but within Canada, the United States of America, or the United Kingdom. To be effective, the “deemed” enduring power of attorney or representation agreement must be accompanied by a prescribed certificate from a solicitor permitted to practice in the jurisdiction in which the “deemed” power was made.
- The legislation in some provinces, such as Newfoundland and Labrador, is silent as to whether powers of attorney (or the equivalent) from other jurisdictions may be recognized.
- Other provinces or territories have different considerations for documents of powers dealing with property and personal or health care issues.

## Validity is questionable across borders

The validity of your Canadian powers of attorney while outside the country depends on the jurisdiction in which you will be residing or visiting. For example, legislation in certain “snowbird” states, such as Arizona and Florida, recognizes powers that are prepared under the laws of other U.S. states, but not from other foreign jurisdictions. As such, your Canadian powers of attorney may not be valid.

Independent legal advice regarding substitute decision-making in the relevant jurisdiction(s) is critical to ensure that your wishes regarding management of your property and health care decisions can be carried out. Considerations in undertaking multijurisdictional incapacity planning are similar to those regarding the rest of your estate planning, and it is important to comply with the laws of the jurisdiction in which you are resident and in which the powers of attorney are executed:

- If the laws regarding execution or even the form of powers of attorney differ from the laws of your home

province, you should consider separate “situs” powers of attorney for property addressing these nuances in the law, especially if extra-jurisdictional documents are not recognized in the foreign jurisdiction.

- The choice of attorney is also an important consideration. Certain jurisdictions require the attorney to be resident in that jurisdiction, or there may be limitations on what the attorney may be able to do.
- If you will be moving outside of Canada, you should review your estate planning options with a local legal professional to determine what documents will be necessary to ensure your decision-making rights are protected in the event of incapacity.
- Your legal professional in Canada should be well versed in cross-border incapacity planning and may need to confer with counsel in the relevant jurisdiction(s) to ensure compliance with its laws.
- Having separate “situs” powers of attorney may also increase the risk of inadvertently revoking one or more of these documents when you are updating any one of them.
- Careful review of your entire plan is critical to its overall success and continuing validity.

**Incapacity planning considerations for your worldwide travels**

There are other practical considerations that may impact cross-border incapacity planning, including:

- The likelihood of requiring substitute decision-making while you are abroad may impact your decision to undertake incapacity planning in that jurisdiction. A young, healthy traveller may be less likely to take these steps than someone in declining health or in their twilight years. In any case, you may wish to discuss any concerns you have with your health care provider and legal counsel.

- The decision to have a separate “situs” power of attorney executed may also be impacted by how much time you will spend in the foreign jurisdiction.
- If you or your assets will be located in a jurisdiction with an official language other than English or French, you may want powers of attorney drafted in the local language to avoid any issues with interpretation or translation.
- The costs associated with obtaining legal counsel and possibly requiring translation services in the foreign jurisdiction might be a consideration, but should be weighed against the costs and delay that might arise to have an extra-jurisdictional power of attorney interpreted and validated by local authorities (or for your Canadian powers of attorney not to be recognized).

There is no easy approach to planning for your incapacity, and you should review your options, concerns and personal circumstances with your legal counsel. However, no matter which approach is taken, your needs are best met by an estate and incapacity planning lawyer with cross-border experience. Coordination between your legal and financial professionals is critical to ensure success of your plan.

**Seek advice**

Speak with your BMO financial professional if you have assets in another jurisdiction or you travel frequently, as they can direct you to a BMO Estate Planning Specialist who will help to ensure that your plan effectively deals with these issues.

**For more information, speak with your BMO financial professional.**



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