

BMO NESBITT BURNS

# A Guide To Granting Powers Of Attorney



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## WHAT IS A POWER OF ATTORNEY?

### Peace Of Mind For Your Future

A Power of Attorney is an important part of a complete financial plan. A Will ensures that your financial affairs are managed according to your wishes after your death. However, only a Power of Attorney can provide for the proper management of your property and financial affairs, should you become mentally incapable or have to be absent for an extended period of time.

This Guide explains the Power of Attorney and how best to put it in place.

### Laws Differ By Province And Are Subject To Change

In Canada the laws of the province of a person's residence apply to Powers of Attorney. However in some cases the law of the place where property is located, particularly real estate, may apply. In addition laws are always subject to change. For these reasons it is particularly important to receive personalized professional advice in the preparation and use of a Power of Attorney.

Because this Guide is intended to apply to all provinces, we will refer to a Power of Attorney which survives your incapacity as a Continuing or Enduring Power of Attorney. The terms "Power of Attorney", "donor" and "attorney" should be read to include "Mandate", "mandator" and "mandatary", which are the Quebec equivalents.

## What Is A Power Of Attorney?

A Power of Attorney can ensure your affairs are well managed during your absence or if you lose the capacity to manage them yourself.

A Power of Attorney is a document in which you appoint another person or trust company (the attorney) as your agent and confer authority to perform certain specified acts or kinds of acts on your behalf. A general Power of Attorney gives the authority to manage all property for your sole benefit, but it is possible to limit that scope.

- You may restrict the Power of Attorney to specific assets or transactions such as bank accounts, securities, business dealings or the sale of particular real property.
- The Power of Attorney may also be limited in time. For example, you might authorize your attorney to deal with your property, or some portion of it, for a specific period only, such as while you are out of the country.
- In all provinces a Power of Attorney may also authorize the attorney to continue acting on your behalf should you become incapable of managing your own affairs. In Ontario, this is called a Continuing Power of Attorney for Property and is the focus of this Guide. In some provinces, it is called a Durable or Enduring Power of Attorney. In British Columbia, since September 2001, this power may be conferred under a Representation Agreement.

- In Quebec a Power of Attorney may take effect immediately. However, if it is to continue after the donor is no longer capable of managing his or her own affairs, a court must determine that the donor is no longer capable and ratify the Power of Attorney to continue. Such a power of attorney in Quebec is called a Mandate in Anticipation of Incapacity.

## WHY A CONTINUING OR ENDURING POWER OF ATTORNEY IS IMPORTANT

### Being Without A Continuing Or Enduring Power Of Attorney Could Leave You Vulnerable

For the security and peace of mind that it provides, we believe that every adult should have a Continuing or Enduring Power of Attorney. Some common misconceptions regarding the Powers of Attorney may be holding you back from making the appropriate arrangements for one. This guide addresses those misconceptions and shows why it is important to have a valid Power of Attorney in place.

Susan knew she would be impossible to reach for the six months she would be in Borneo. If a decision was needed on her investment portfolio, she wanted someone she trusted as her representative.

She granted a Continuing Power of Attorney to her lawyer.

## Family Members Are Not Automatically Authorized

The first misconception is that, in the event of a loss of capacity, a family member can automatically deal with your property. If you have not granted a Continuing or Enduring Power of Attorney to a family member, he or she will not be authorized to manage your property without obtaining a court order or the approval of a provincial government official. This can be costly and time-consuming, and the family member may be denied the authority to act for reasons which you may not consider important. The court could also appoint someone you may not approve of to manage your property or impose conditions regarding the management of your property with which you might not agree.

## With Joint Property, A Spouse Or Other Joint Owner Can Only Deal With Some Assets

Another popular misconception is that, because all of your property is held jointly with your spouse, your spouse will be able to manage it if you lose capacity. This is not entirely true. Your spouse may be able to deal with joint bank accounts, but would not be able to sell or mortgage a jointly-owned home or other real property. These transactions require the signature of both owners or, if one of them is incapable, the signature of his or her attorney. If there is no attorney, the court may appoint a representative. This can place an extremely difficult burden on your spouse in what would already be a difficult time.

## Incapacity Can Come At Any Time

The lack of mental capacity tends to be associated with the onset of age-related illnesses. In fact, many people lose capacity as the result of an accident, or due to other illnesses unrelated to age. A loss of mental capacity can occur suddenly, so it is important to make arrangements for a Continuing or Enduring Power of Attorney while you are able.

## CHOOSING THE RIGHT ATTORNEY

### Grant Your Power Of Attorney To Whomever You Trust Will Do The Job Well

Even though the title is “attorney” you don’t have to appoint a lawyer to the role. You may choose anyone you think is appropriate, as long as that person is a mentally capable adult, or you may choose a trust company. You may also appoint multiple attorneys if you wish to do so.

### Know The Requirements

To ensure that you select the right attorney, it is wise to consider the nature and complexity of the tasks they may have to perform. Once you know what may be required of your attorney(s), you should choose someone who will be able to deal with those matters personally, or a group of attorneys who will be able to work together. In addition, each attorney should be someone you trust to manage your property prudently and in your best interests.

## Select Someone You Trust

With these criteria in mind, you have many options from which to choose. Your spouse, adult children, lawyer, accountant, other family member or friend may be appropriate, depending on your circumstances.

A severe car accident left Lorraine in a coma for three months. Because she had granted a Continuing Power of Attorney to her husband, he was able to manage her financial affairs until she recovered her full health.

If named as an Executor in your Will, a trust company, such as BMO Trust Company, may be a good choice for your attorney as well, especially if you require specialized expertise or there is no suitable individual to act.

Even if you decide that your spouse is the best choice to act as your attorney, it is wise to appoint someone else to act either along with or as an alternate to your spouse. There are several reasons for this:

- You and your spouse may travel out of the country together;
- You and your spouse may be involved in an accident together;
- Your spouse may become incapable or die while acting under the Power of Attorney on your behalf; or
- Your spouse may not be familiar with making investment decisions or the workings of your business.

Below is a sampling of the agencies or individuals your attorney(s) may be required to deal with when managing your financial affairs, depending on the nature of your property.

- Investment Advisors
- Canada Revenue Agency
- Banks
- Accountants
- Management of Your Company
- Investment Counsellors
- Employer
- Canada or Quebec Pension Plan
- Health/Disability Insurers
- Old Age Security
- Employees
- Lawyers
- Your Family

### Make Special Arrangements For A Business

Special consideration may be required if you have a business. In some instances, one Continuing or Enduring Power of Attorney under which your attorney(s) will manage both your business and personal finances may be appropriate. However, your business may be large and complex, and require someone familiar with the business to manage it. The person appropriate for this role may not be suitable to manage your personal finances. In this circumstance, you may wish to have two simultaneous Continuing or Enduring Powers of Attorney. One document names an attorney to manage your business, and the other names an attorney to manage your personal financial affairs and non-business property. With multiple Powers of Attorney, care must be taken to ensure one does not revoke the others.

## WHAT THE POWER OF ATTORNEY SHOULD STATE

### Provide Thorough And Clear Instructions To Your Attorney

Subject to the law applicable in the province where you live, the nature of your property, and your circumstances, your Continuing or Enduring Power of Attorney may address any of the following:

- Appointment of your attorney(s) and any alternates. If you appoint more than one attorney, they all must act *jointly* (each must agree to any decision and sign all cheques and other documents), unless you specify they may act *jointly* and *severally* (any one of the attorneys may make a decision or sign a cheque or document). In either case, if more than two are appointed, you may choose to specify that a decision of the majority will govern, in order to prevent deadlock.
- Authorization to manage your property to the same extent you could if capable, subject to any limitations imposed by you.
- When the Power of Attorney will take effect.
- Instructions for continued financial assistance for non-dependents during your incapacity (e.g. school fees for grandchildren).
- Instructions concerning gifts to family, friends or charity, if this has been your choice in the past.

- Instructions you may have concerning the use, maintenance, sale of, or borrowing against particular property, such as a cottage.
- Whether and on what basis your attorneys are to receive compensation from your property for their efforts.
- Whether your attorneys will have the power to retain agents to assist them with their duties.

The support and gifts provisions of your Power of Attorney may be made conditional upon there being funds available in excess of the needs of you and your spouse.

## POWER OF ATTORNEY FOR PERSONAL CARE

### Ensure Your Medical Instructions Are Clearly Recorded

Most provinces allow you to give directions concerning your medical care in the event you lose the capacity to make the necessary decisions for yourself. Depending upon the province in which you live, this direction may be either a Power of Attorney for Personal Care or a Living Will. Under a Power of Attorney for Personal Care, you appoint an attorney or attorneys to make medical decisions for you, subject to any instructions you have given. Typically, this document is effective only to the extent that you lose mental capacity and are unable to make decisions yourself.

With the news that he had a debilitating disease, Tyler knew that eventually he would need someone to manage his medical care and his property.

Granting a Continuing Power of Attorney and Power of Attorney for Personal Care to his wife, with his two adult children and his brother, as alternates, has contributed to Tyler's peace of mind.

In a Living Will (sometimes called an advance medical directive, health care directive or mandate), you do not necessarily empower someone to make these decisions for you. Instead, you specify your medical instructions in the Living Will, with as much clarity as possible. Some provinces allow you to name a proxy to carry out these instructions in the event you lose capacity, or to make decisions that are not addressed in the Living Will.

Your Continuing or Enduring Power of Attorney and your Power of Attorney for Personal Care or Living Will should be separate documents, even though you may choose the same attorney or proxy for both. Besides possibly naming different attorneys and having different purposes, the individuals and institutions who need to be shown the two documents will be quite different. Separate documents ensure better protection of your privacy.

In Quebec, a Mandate in Anticipation of Incapacity may be given for financial and property matters and for personal care in the same document. Such a document may name two different persons to act as mandatory for administration of property and mandatory for protection of the person, or the same mandatory to perform both functions.

## DEFINING THE RIGHT TIME FRAME FOR YOUR POWER OF ATTORNEY

### Choose A Time Frame With Which You Are Most Comfortable

One of the things that may inhibit many people from granting a Continuing or Enduring Power of Attorney is their concern over when it takes effect and when it ceases. Many people intend their Continuing or Enduring Power of Attorney to be acted upon only in the event they lose capacity. It is wise, however, for your Continuing or Enduring Power of Attorney to be effective immediately and continue to be in effect in the event that you lose capacity. There are practical reasons for this.

- If your Continuing or Enduring Power of Attorney comes into effect only when you have lost capacity, your attorneys will have to establish your lack of mental capacity which may require a declaration of the court. This may incur costs and delays.
- Some of the privacy afforded by having a Continuing or Enduring Power of Attorney may be lost.
- Attorneys who may be happy to act on the basis that they are “helping you out”, may be unwilling to take the step of having the court declare you incapable.
- The attorneys will have no authority to act under the Continuing or Enduring Power of Attorney if you are having physical difficulty (rather than mental difficulty) dealing with your financial

affairs; if you lose sufficient interest to manage some or all of your property; or if you are out of the country.

If you do prefer that your Continuing or Enduring Power of Attorney apply only in the event of a loss of capacity, you may wish to specify a method, preferably one which does not involve the court, by which your loss of capacity can be established. The Continuing or Enduring Power of Attorney may state that one or more medical certificates signed by qualified doctors will constitute sufficient evidence of your loss of capacity. However, banks, investment dealers and others who hold your property may question the attorneys’ authority to act and require evidence that you have not regained capacity since a medical certificate was completed, before allowing the attorneys to deal with your property. This may cause delay or lead to the court application you wished to avoid.

While there are practical benefits to having the Continuing or Enduring Power of Attorney effective immediately, there is a risk. It is a matter of trust between you and the attorneys that they will not act until you have lost capacity or until you have instructed them to do so. This risk may be lessened somewhat by having the document held by someone you trust to give it to the attorneys, based on your instructions, once appropriate evidence of incapacity (as defined by you) is provided



## HOW BMO NESBITT BURNS CAN HELP

Your Investment Advisor can assist you with Powers of Attorney in a variety of ways.

He/she can assist you in finding the right professional to help you prepare your Continuing or Enduring Power of Attorney as part of a complete estate plan.

If named as Executor of your Will, BMO Trust Company can also act as the attorney, or one of the attorneys, under your Continuing or Enduring Power of Attorney.

## BMO NESBITT BURNS – A PROFILE

As one of Canada's leading investment firms, BMO Nesbitt Burns Inc. has an established reputations within financial services. Since its origins in 1912, the firm has been committed to providing clients with advice and services of the highest standards.

The Private Client Division of BMO Nesbitt Burns is focused on meeting the needs of individual investors through a customized approach to investing. Our Investment Advisors provide clients with personal advice and services, drawing upon some of the best knowledge and expertise in the industry including our firm's top ranked research.\*

As a member of BMO Financial Group, BMO Nesbitt Burns can provide clients with access to one of the broadest selections of investment solutions and products available today, both in Canada and the United States.

If you would like information on other products and services available from BMO Nesbitt Burns, or more information about our educational publications, simply contact your Investment Advisor or the BMO Nesbitt Burns office nearest you.

Visit us on the World Wide Web at [www.bmonesbittburns.com](http://www.bmonesbittburns.com)

\* Brendan Wood International Survey. Institutional Equity Research, Sales and Trading Performance in Canada, 2004 Report.