Manitoba Law Reform Commission

CREATING EFFICIENCIES IN THE LAW:

SUBSTITUTE POWERS OF ATTORNEY

Final Report

February 2017

Manitoba Law Reform Commission

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Please note that the information provided and recommendations made in this Report do not necessarily represent the views of those who have so generously assisted the Commission in this project.

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EXECUTIVE SUMMARY

Powers of attorney allow individuals to appoint a person, known as the attorney, to manage their business or personal affairs. Often, individuals will contemplate the appointment of successor attorneys if the original attorney is unable to act. *The Powers of Attorney Act*[1] provides the legislative authority for creating enduring powers of attorney in Manitoba. Enduring powers of attorney will continue in effect despite the mental incompetence of the donor after the execution of the power of attorney.[2]

The Powers of Attorney Act requires that once an attorney has assumed power under an enduring power of attorney the attorney can only resign with judicial approval, even where a substitute attorney has been named by the donor in contemplation of the possibility that the original attorney would no longer be willing and able to act.[3] In the Manitoba Law Reform Commission's view, the requirement to seek judicial approval is neither efficient nor cost effective for both the attorney and the justice system. Accordingly, the Manitoba Law Reform Commission ("Commission") recommends the Act be amended to allow an attorney to renounce without judicial approval in order to carry out the donor's intentions.

This report is limited to reviewing one particular aspect of *The Powers of Attorney Act* which has been identified by legal practitioners as problematic. It forms part of a series of reports entitled *Creating Efficiencies in the Law*, which seek to address discrete, straightforward issues that, in the Commission's view, can be improved with relatively simple legislative amendments.

[1] CCSM c P97.
[2] *Ibid*, s 10(1).
[3] *Ibid*, s 21.

RÉSUMÉ

Une procuration permet à une personne de nommer quelqu'un en qui elle a confiance, appelé le mandataire, pour gérer ses affaires commerciales ou privées si elle devient inhabile et ne peut plus gérer ses affaires. Souvent, les personnes envisagent de nommer des mandataires de substitution si le mandataire original ne peut pas agir. La Loi sur les procurations[4] donne une compétence législative pour la création d'une procuration durable au Manitoba. La Loi permet aux procurations de ne pas prendre fin du seul fait que le mandant devient inhabile sur le plan mental.[5]

La Loi sur les procurations exige qu'une fois qu'un mandataire assume ses pouvoirs en vertu d'une procuration, il ne peut démissionner que sur autorisation judiciaire. C'est le cas même lorsque le mandant a expressément nommé un mandataire suppléant au cas où le mandataire original ne puisse plus agir. Du point de vue de la Commission, cette disposition créé des coûts et des dépenses inutiles pour les personnes qui procèdent de manière prudente à une planification successorale moderne. Au niveau de la procédure, il n'y a aucun avantage à une intervention du tribunal lorsqu'un mandataire souhaite démissionner et qu'un mandataire suppléant est déjà identifié. De ce fait, la Commission recommande que la Loi soit modifiée pour permettre à un mandataire de démissionner sans autorisation judiciaire, afin de respecter les intentions du mandant.

Le présent rapport est limité à l'examen d'un aspect particulier de la Loi sur les procurations que des professionnels du droit ont identifié comme étant problématique. Il fait partie d'une série de rapports intitulée *Creating Efficiencies in the Law*, cherchant à régler des problèmes simples et ponctuels qui, du point de vue de la Commission, peuvent être améliorés avec des modifications législatives relativement simples.

[4] c. P97 de la C.P.L.M.
[5] *Ibid*, par. 10(1).

CHAPTER 1: INTRODUCTION

When an attorney under a power of attorney wants to resign and there is a substitute attorney identified, is judicial approval necessary and efficient?

Powers of attorney form an integral part of modern estate planning. Routinely, when an individual wants a will drafted, they also plan for the possible "pre-death" stages of life where they might become incompetent and unable to manage their affairs. Powers of attorney allow individuals to plan for this unhappy eventuality and appoint someone that they trust to manage their business or personal affairs. Prudent legal practitioners will raise the possibility of appointing a power of attorney during estate planning. Further, prudent legal practitioners will contemplate the appointment of successor attorneys if the original attorney is not able to act for whatever reason.

It is in this scenario that the inefficiencies in Section 21 of *The Powers of Attorney Act*[6] come to the fore. Section 21 of Manitoba's *Powers of Attorney Act* requires that once an attorney has assumed power under an enduring power of attorney they can only resign with judicial approval.[7] This requirement exists even where the donor had expressly named a substitute attorney in contemplation of the possibility that the original attorney could no longer act. Some other jurisdictions do not require this, thereby sparing attorneys the time and expense of a court application. In the Commission's view, these provisions of the Act create unnecessary cost and expense for people who are prudently engaged in modern estate planning.

This Report is not intended to provide a wholesale review of *The Powers of Attorney Act*, but rather, will be limited to reviewing one particular aspect of the Act which has been identified by legal practitioners as problematic. This Report forms part of a series of reports entitled *Creating Efficiencies in the Law*, which seek to address discrete, straightforward issues that, in the Commission's view, can be improved with relatively simple legislative amendments.

Chapter 2 of this Report briefly describes the law related to powers of attorney in Manitoba and then follows with a discussion of the relevant provisions in other Canadian jurisdictions. Chapter 3 explores the need for reform and makes five recommendations to address this issue.

[6] CCSM c P97.
[7] *Ibid*, s 21.

CHAPTER 2: BACKGROUND

In discussing the need to reform the relevant sections of *The Powers of Attorney Act*, it is important to put this issue in context by briefly examining the broader principles.

1. Common Law Principles

The concept of powers of attorney has its origins in common law agency principles. The law of agency enables person A, called the principal, to empower person B, called the agent, to effect with person C, called the third party, a transaction affecting the legal relationship of persons A and C. Often the empowerment of person B by person A is done by a document called a power of attorney. In the context of a power of attorney, person A, the principal, is called the donor and person B, the agent, is called the attorney. Thus, by a power of attorney, the donor/principal gives to the attorney/agent power to act for the donor with a third party or parties.

By the common law of agency, the agency arrangement terminates automatically with the occurrence of various events, including the principal, or donor in the case of a power of attorney, becoming mentally incompetent, necessitating a court application to have the court appoint someone, perhaps the attorney of a terminated power of attorney, to act for the mentally incompetent to take care of that person's financial and other property affairs. This expensive and inconvenient judicial intervention was overcome, beginning in the 1970s, by the statutory creation of the enduring power of attorney, which continues to be effective after the donor becomes mentally incompetent.[8]

At common law, an attorney may resign his or her appointment by giving notice to the donor. However, as the next section will discuss, Manitoba's *Powers of Attorney Act* requires that an attorney under a duty to act may only renounce the appointment with permission of the court.

2. Manitoba's *Powers of Attorney Act*

The Powers of Attorney Act provides the legislative authority for creating enduring powers of attorney in Manitoba.[9] The provisions for enduring powers of attorney were originally enacted in

[8] *Powers of Attorney Act*, S.M. 1980, c. 4. In some jurisdictions such a power of attorney is called a continuing or a durable power of attorney, instead of an enduring power of attorney.

[9] *The Powers of Attorney Act, supra* note 6, ss 10-25. In order to stimulate the harmonization of Canadian enduring powers of attorney legislation, in 2008 the four Western Canadian law reform agencies (WCLRA) published a joint Report, *Enduring Powers of Attorney: Areas for Reform - A Project of the Western Canada Law Reform Agencies*, July 2008 (available online: http://www.manitobalawreform.ca/pubs/pdf/enduring_power_attorney-full_report.pdf) and the Manitoba Law Reform Commission also published *Enduring Powers of Attorney: Areas for Reform - Supplementary Report* (Report #117, 2008), (available online: http://www.manitobalawreform.ca/pubs/pdf/117-full_report.pdf.) The WCLRA Report does not deal with all aspects of the enduring power of attorney legislation of the four western provinces, leaving some statutory differences to be treated as each of the provinces sees fit. The Supplementary Report provides an overview of the impact of the WCLRA Report on *The Powers of Attorney Act* of Manitoba, identifying the sections that are affected and not affected and recommending additional changes to the Act. Neither report has been implemented by the government.

1980,[10] based on the recommendations made by the Commission in its report on *Special and Enduring Powers of Attorney*.[11] The Act allows the authority given by a donor to an attorney to endure despite the mental incompetence of the donor after the execution of the power of attorney.[12] The Act codifies the common law principle that the attorney has a fiduciary relationship vis-à-vis the donor and calls on attorneys to exercise the judgment and care "that a person of prudence, discretion and intelligence would exercise in the conduct of his or her own affairs."[13]

The Act provides that the authority of an attorney under an enduring power of attorney automatically terminates under certain circumstances, including when the attorney becomes bankrupt, mentally incompetent or dies.[14] A donor of an enduring power of attorney can anticipate these events by appointing in the power of attorney a substitute attorney and include in the wording for an attorney renouncing an appointment; incidentally, if a power of attorney does not provide for a substitute attorney, by common law a court cannot appoint a substitute attorney.[15] It is especially important for a donor to provide for a substitute attorney in an enduring power of attorney, because, if the donor becomes mentally incompetent, the donor loses the mental capacity to appoint a substitute attorney in the event of the attorney renouncing, becoming mentally incompetent, or dying after the donor has become mentally incompetent.[16]

As mentioned above, *The Powers of Attorney Act* requires that once an attorney has assumed power under an enduring power of attorney the attorney can only resign with judicial approval.[17] This is the case even where the donor had expressly named a substitute attorney in contemplation of the possibility that the original attorney could no longer act.

Sections 19(1) and 21 of *The Powers of Attorney Act* of Manitoba provide:

> 19(1) An attorney under an enduring power of attorney who knows or ought reasonably to know that the donor is mentally incompetent is under a duty to act on behalf of the donor during the mental incompetence if
>
> (a) the attorney has at any time acted under the power of attorney or otherwise indicated acceptance of the appointment as attorney; and
>
> (b) the power of attorney has not been terminated.

[10] *Powers of Attorney Act*, S.M. 1980, c. 4, *supra* note 6. The 1980 Act was subsequently repealed and replaced by CCSM c P97 (in force: 7 April 1997).
[11] Manitoba Law Reform Commission, *Report on Special, Enduring Powers of Attorney* (Report #14, 1974), available online: http://www.manitobalawreform.ca/pubs/pdf/archives/14-full_report.pdf.
[12] *The Powers of Attorney Act*, *supra* note 6, s 10(1).
[13] *Ibid*, s 19(2).
[14] *Ibid*, s 13.
[15] *Re Potasky* (2002), 164 Man R (2d) 310 (QB).
[16] *The Powers of Attorney Act*, *supra* note 6, s 10(3).
[17] *Ibid*, s 21.

> 21 An attorney **<u>may not renounce the appointment</u>** as attorney while subject to the duty to act under subsection 19(1) **<u>except with the leave of the court</u>**. [emphasis added]

Therefore, when an attorney wishes to resign and be replaced by a named substitute attorney, the attorney is required to apply to court and, pursuant to the Act, give notice of the application to the donor, the Public Guardian and Trustee, and any other person as the court may order.[18] The court may make any order it considers appropriate, including a declaration that a power of attorney is terminated and appointing a new attorney, having regard to the power of attorney and the donor's intentions.[19]

The Act provides that a donor may appoint any number of persons to act jointly or successively as the attorney. In circumstances where the donor has appointed two or more joint attorneys, if one of the attorneys dies, renounces the appointment, or becomes bankrupt or mentally incompetent, the remainder of the attorneys are still able to make the decisions and the decision of the majority of the remainder is deemed to be the decision of all.[20]

3. Other Canadian Jurisdictions

Although all the provinces and territories of Canada have enacted powers of attorney legislation, there is considerable variation. Since the enduring power of attorney is a statutory creature, the statutory law regarding it varies from place to place.

Similar to Manitoba, the powers of attorney legislation in Alberta, Yukon, the Northwest Territories, and Nunavut require an attorney to apply to court to have the power of attorney renounced, even where a substitute attorney had been named in the power of attorney.[21]

Unlike the Manitoba, Alberta, and the territorial Acts, the powers of attorney legislation of British Columbia, Saskatchewan, and Ontario provide for an attorney simply to renounce, without any judicial oversight.[22]

Section 25 of British Columbia's *Power of Attorney Act* provides:

> **25** (1) In this section, **"close friend"**, in respect of an adult who has made an enduring power of attorney, means another adult who has a long-term, close personal relationship involving frequent personal contact with the adult, but does not include a

[18] *The Powers of Attorney Act*, *supra* note 6, s 24(3).
[19] *Ibid*, s 24(1).
[20] *Ibid*, ss 17 & 18.
[21] *Powers of Attorney Act*, RSA 2000, c. P-20, ss. 8 and 12(1); *Enduring Power of Attorney Act*, RSY 2002, c. 73, ss. 9 and 13(1); *Powers of Attorney Act*, SNWT 2001, c. 15 ss. 12 and 22; *Powers Attorney Act*, SNu 2005, c.9, ss. 9 and 24.
[22] *Power of Attorney Act*, RSBC 1996, c. 370, s. 25; *Powers of Attorney Act*, SS 2002, c P-20.3, s. 19(1)(e); *Substitute Decisions Act*, 1992, SO 1992, c. 30, s. 11.

person who receives compensation for providing personal care or health care to the adult.

(2) An attorney may resign by giving written notice to the adult and any other attorneys named in the enduring power of attorney.

(3) In addition to the persons referred to in subsection (2), if the adult is incapable of making decisions at the time the attorney resigns, the attorney must give written notice of the resignation to a spouse, near relative or, if known to the attorney, close friend of the adult.

(4) The resignation of an attorney is effective

(a) when notice has been given under this section, or

(b) on a later date specified in the notice.[23]

Similarly, Saskatchewan's *Powers of Attorney Act* provides that the authority of an attorney is terminated on the written resignation of the attorney given to the donor or other attorneys, if appointed, or the most immediate and available adult family member of the donor.[24] Ontario's *Substitute Decisions Act*, meanwhile, contains a similar requirement to that of British Columbia and Saskatchewan and expressly provides that the attorney must give notice of his or her resignation to the person named by the power of attorney as a substitute for the attorney who is resigning, if the power of attorney provides for the substitution of another person.[25]

The legislation of New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador does not address attorney renunciation.[26]

[23] *Power of Attorney Act*, RSBC 1996 c 370, *ibid*. In British Columbia's Act, the "adult who has made an enduring power of attorney" is equivalent to the "donor" in Manitoba's Act.
[24] *Powers of Attorney Act*, SS 2002, c P-20.3, *supra* note 23.
[25] *Substitute Decisions Act, 1992* SO 1992, c 30, *supra* note 22.
[26] Nova Scotia's *Powers of Attorney Act*, RSNS 1989, c 352, ss 5(1) provides that an attorney may apply to a judge of the Supreme Court for an order substituting another person as attorney, and the court may grant the application. In its Final Report on *The Powers of Attorney Act* (August 2015) at 194, the Law Reform Commission of Nova Scotia recommended that the Act should provide that the court may not substitute a person who is not named as an attorney or alternate attorney in an enduring power of attorney, unless the power of attorney so authorizes. (Available online: http://www.lawreform.ns.ca/Downloads/Final_Report_Powers_of_Attorney_Act.pdf.)

CHAPTER 3: THE NEED FOR REFORM

1. Reforms to Sections 19 and 21 of *The Powers of Attorney Act*

As discussed, Section 21 of Manitoba's *Powers of Attorney Act* requires that once an attorney has assumed power under a power of attorney the attorney can only resign with judicial approval.[27] This requirement exists even where the donor had expressly named a substitute attorney in contemplation of the possibility that the original attorney could no longer act. In the Commission's view, this provision creates unnecessary cost and expense for people who are prudently engaged in modern estate planning. There is no procedural benefit to court intervention when an attorney wants to resign and a substitute attorney is already identified. As previously mentioned, the Act already provides that the authority of an attorney under an enduring power of attorney terminates without judicial approval if the attorney becomes bankrupt, mentally incompetent or dies.[28] Accordingly, the Commission recommends the Act be amended to allow an attorney to renounce without judicial approval where a substitute attorney is named in the power of attorney in order to carry out the donor's intentions.

The Commission notes that this position diverges from comments made in its 2008 Report on *Enduring Powers of Attorney: Areas for Reform – Supplementary Report*, where the Commission noted:

> A donor who understands an attorney to have accepted appointment as an attorney may quite reasonably believe that the donor's affairs will be under proper management should he or she become mentally incompetent. An attorney who wishes to be relieved of his or her duties may renounce the appointment with leave of the court, but until that time, the acceptance of attorney duties under an EPA should be considered to be a binding commitment and give rise to a duty to act.[29]

Based on feedback received from legal practitioners,[30] the Commission is aware of the practical difficulties that this requirement creates. The enduring power of attorney was created to obviate the necessity of a judicial proceeding after a donor becomes mentally incompetent to enable the

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[27] *Ibid*, s 21.
[28] *Ibid*, *supra* note 6, s 13.
[29] Manitoba Law Reform Commission, Report #117, *Enduring Powers of Attorney: Areas of Reform – Supplementary Report* (September 2008), *supra* note 9 at 21. Available online: http://manitobalawreform.ca/pubs/pdf/117-full_report.pdf.
[30] In August 2016, the Commission released a Consultation Report on this topic in order to gain a practical perspective and to ensure that its recommendations were consistent with those working in this area. Based on the feedback received, the Commission's recommendation that an attorney should have the ability to renounce without judicial approval is generally supported by legal practitioners. Further, respondents provided practical input that helps to inform this report and to include additional recommendations. See Manitoba Law Reform Commission, *Creating Efficiencies in the Law: Substitute Powers of Attorney*, (Consultation Report, August 2016), available online: http://manitobalawreform.ca/pubs/pdf/additional/consultation_august2016.pdf.

continuation of the donor's property and affairs being looked after. Similarly, the Commission agrees with the argument that for the same reasons, inconvenience and expense, Section 21 should be amended to do away with the judicial proceeding it now requires, bringing Manitoba's Act in line with those of British Columbia, Saskatchewan and Ontario. The Commission's recommendation is also in line with a recommendation recently made by the Law Reform Commission of Nova Scotia's Report on *The Powers of Attorney Act*, which noted that "[r]equiring notice, rather than a court order, allows an attorney to resign without undue expense or burden, while making sure that the donor's family members and other interested parties are made aware that the attorney is no longer acting."[31]

In the Commission's view, Manitoba's *Powers of Attorney Act* should be amended to provide that, in situations where the donor has named a substitute attorney or attorneys, an attorney may resign by giving written notice to the donor, or, if the donor is mentally incompetent, to any other attorney(s) including substitute attorney(s), to any person named as a recipient of an accounting in the enduring power or attorney and to the donor's spouse or partner. If the donor has no spouse of partner, then written notice should be given to the donor's nearest relative, as that term is defined in the Act:

> "nearest relative" means, with respect to a donor,
>
> (a) the adult person who is mentally competent and first listed in the following series:
>
> (i) spouse, unless the donor has a common-law partner,
> (i.1) common-law partner,
> (ii) child,
> (iii) grandchild,
> (iv) great-grandchild,
> (v) parent,
> (vi) sibling,
> (vii) niece or nephew, or
>
> (b) where no person qualifies under clause (a), the Public Guardian and Trustee[32]

This recommendation, if implemented, would allow the donor's intentions to be fulfilled without requiring the attorney to apply to court and would improve the efficiency of the law for enduring powers of attorney in Manitoba.

The Commission notes that Section 24 of *The Powers of Attorney Act* allows the Public Guardian and Trustee, the nearest relative of the donor, a recipient of an accounting or, with the approval of the court, an interested person, the ability to apply to court if there is concern about an

[31] Law Reform Commission of Nova Scotia, *The Powers of Attorney Act:* Final Report (2015) at 200. Available online: http://www.lawreform.ns.ca/Downloads/Final_Report_Powers_of_Attorney_Act.pdf.
[32] *The Powers of Attorney Act*, *supra* note 6, s 1(1).

enduring power of attorney. This provision helps to ensure that the donor's intentions are carried out and allows a person to challenge the renouncement or substitution of an attorney:

> Jurisdiction of the court
>
> 24(1) Upon an application made in respect of an enduring power of attorney, the court may, having regard to the power of attorney and the donor's intentions, make any order the court considers appropriate, which may include the following:
>
> (a) an order providing advice or directions on any matter respecting the management of the donor's estate;
>
> (b) a declaration that the donor is mentally incompetent;
>
> (c) a declaration that a power of attorney is invalid or terminated;
>
> (d) an order removing the attorney appointed under the power of attorney;
>
> (e) an order requiring the attorney to provide the court with an accounting;
>
> (f) subject to the provisions of the enduring power of attorney, an order varying the powers of the attorney;
>
> (g) subject to the provisions of the enduring power of attorney, an order appointing a person as an attorney in place of the attorney appointed under the enduring power of attorney.
>
> Who may apply and when
>
> 24(2) An application under subsection (1) may be made by an attorney, the Public Guardian and Trustee, the nearest relative of the donor, a recipient of an accounting under section 22 or, with the approval of the court, an interested person, at any time after the execution of the enduring power of attorney.

<u>Recommendation #1</u>: Section 21 of *The Powers of Attorney Act* should be amended to provide that:

- **where the donor has named a substitute attorney or attorneys in an enduring power of attorney; and**
- **where the donor is mentally incompetent,**

an attorney is permitted to resign by giving written notice to any other attorney(s) including the substitute attorney(s), any person named as a recipient of an accounting in the enduring power of attorney and the donor's spouse or partner, or, if the donor has no spouse of partner, then written notice should be given to the donor's nearest relative, as that term is defined in the Act.

The Commission is of the view that the current Section 21 should continue to govern in situations where no substitute attorneys have been named and where the enduring power of attorney does not give the attorney the authority to appoint a substitute. In other words, an

attorney who wants to renounce should still be required to seek leave from the court if the donor did not name a substitute power of attorney in the enduring power of attorney. This will guard against situations where an attorney walks away from their duties without ensuring that a substitute is in place to take over the donor's affairs.

That being said, the Commission notes that there may be situations where, even though no substitute power of attorney is named in the enduring power of attorney, it may contain a substitutionary provision that empowers the attorney to appoint a substitute attorney of their choosing. In these situations, the Commission recommends that no judicial intervention is required; the outgoing attorney may renounce by providing written notice as set out in Recommendation #1, with the added provision that the written notice should name a successor attorney. In the Commission's view, this allows the attorney to carry out the donor's intentions without the added expense of obtaining leave of the court.

Recommendation #2: The current Section 21 of *The Powers of Attorney Act* should continue to govern in situations where the enduring power of attorney does not name a substitute attorney or give an attorney the power to appoint a substitute attorney.

Recommendation #3: Section 21 of *The Powers of Attorney Act* should be amended to provide that:

- **where the enduring power of attorney empowers an attorney to appoint a substitute attorney; and**
- **the donor is mentally incompetent,**

the attorney is permitted to resign and appoint the substitute attorney(s) by providing written notice to any other attorney(s) including substitute attorney(s), any person named as a recipient of an accounting in the enduring power of attorney and the donor's spouse or partner, or, if the donor has no spouse of partner, then written notice should be given to the donor's nearest relative, as that term is defined in the Act.

In the Commission's view, a time provision should be incorporated into the proposed amendment to avoid any potential lapse in care or assistance to the donor. For this reason, the Commission recommends that the Act be amended to provide that the attorney's resignation would be effective 30 days after providing written notice. This time provision would allow an outgoing attorney to transfer information related to the donor's affairs to the incoming attorney and would also allow the substitute attorney or other person to consider whether an application to court under Section 24 was required.

Recommendation #4: *The Powers of Attorney Act* should be amended to provide that the attorney's resignation is effective 30 days after providing written notice.

2. Providing an Accounting

Section 22 of *The Powers of Attorney Act* provides:

> Duty of attorney to provide accounting
>
> 22(1) During any period in which an attorney has a duty under subsection 19(1) to act, the attorney shall provide an accounting in respect of the estate
>
> (a) upon demand by any person named as a recipient of an accounting by the donor in the enduring power of attorney; or
>
> (b) where the donor does not name a recipient in the enduring power of attorney or the named recipient is the attorney or the spouse or common-law partner of the attorney or is deceased or mentally incompetent, annually to the nearest relative of the donor.

In the Commission's view, in order to ensure that the donor's affairs are protected, it is important that the renouncing attorney should be required to provide an accounting to account to the date of renunciation.

Recommendation #5: Section 22 of *The Powers of Attorney Act* should be amended to require an outgoing attorney, upon renunciation, to provide an accounting to any person named as a recipient of an accounting by the donor in the enduring power of attorney and to the substitute power of attorney(s).

3. Other Issues

The Commission received comments from the legal profession which indicate that broader reforms to *The Powers of Attorney Act* may be required in order to update the Act. While this Report is limited to the discrete issue of the renunciation of substitute attorneys pursuant to Section 21 of the Act, the Commission will consider whether to undertake a more thorough review in the future. In the meantime, the Commission notes that the recommendations in the Western Canada Law Reform Agencies Report on *Enduring Powers of Attorney: Areas for Reform*[33] and the Commission's 2008 Supplementary Report on *Enduring Powers of Attorney*[34] are still relevant today.

[33] Western Canada Law Reform Agencies Report, *supra* note 9.
[34] *Ibid*, Report #117.

SUMMARY OF RECOMMENDATIONS

<u>Recommendation #1</u>: Section 21 of *The Powers of Attorney Act* should be amended to provide that:

- **where the donor has named a substitute attorney or attorneys in an enduring power of attorney; and**
- **where the donor is mentally incompetent,**

an attorney is permitted to resign by giving written notice to any other attorney(s) including the substitute attorney(s), any person named as a recipient of an accounting in the enduring power of attorney and the donor's spouse or partner, or, if the donor has no spouse of partner, then written notice should be given to the donor's nearest relative, as that term is defined in the Act. (page 8)

<u>Recommendation #2</u>: The current Section 21 of *The Powers of Attorney Act* should continue to govern in situations where the enduring power of attorney does not name a substitute attorney or give an attorney the power to appoint a substitute attorney. (page 9)

<u>Recommendation #3</u>: Section 21 of *The Powers of Attorney Act* should be amended to provide that:

- **where the enduring power of attorney empowers an attorney to appoint a substitute attorney; and**
- **the donor is mentally incompetent,**

the attorney is permitted to resign and appoint the substitute attorney(s) by providing written notice to any other attorney(s) including substitute attorney(s), any person named as a recipient of an accounting in the enduring power of attorney and the donor's spouse or partner, or, if the donor has no spouse of partner, then written notice should be given to the donor's nearest relative, as that term is defined in the Act. (page 9)

<u>Recommendation #4</u>: *The Powers of Attorney Act* should be amended to provide that the attorney's resignation is effective 30 days after providing written notice. (page 9)

<u>Recommendation #5</u>: Section 22 of *The Powers of Attorney Act* should be amended to require an outgoing attorney, upon renunciation, to provide an accounting to any person named as a recipient of an accounting by the donor in the enduring power of attorney and to the substitute power of attorney(s). (page 10)

This is a report pursuant to section 15 of the *Law Reform Commission Act*, C.C.S.M. c. L95, signed this 31st day of January, 2017.

"Original Signed by"
Cameron Harvey, President

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Hon. Lori Spivak, Commissioner

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Jacqueline Collins, Commissioner

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