RISK NOTE

Powers of Attorney

Power of Attorney - Effectiveness for Consent Purposes

In the Province of British Columbia (BC), Powers of Attorney may be either a general power of attorney or an enduring power of attorney

Pursuant to the *Power of Attorney Act (*POAA[1]), a general Power of Attorney confers authority on the Attorney to do, on behalf of the donor, anything that the donor can lawfully do by an attorney (who is essentially the agent of the donor), subject to any limits contained in the document itself. An enduring Power of Attorney means a power of attorney (a) in which an adult authorizes an attorney to (i) make decisions on behalf of the adult, or (ii) do certain things in relation to the adult's financial affairs (Includes an adult's business and property, and the conduct of the adult's legal affairs), and (b) that continues to have effect while, or comes into effect when, the adult is incapable.

The question which arises is, can an Attorney (general or enduring) lawfully exercise the patient's authority to consent for Health Care? ("Health Care" is defined in the *Health Care (Consent) and Care Facility (Admission) Act*[2])

A Power of Attorney can not be granted authority to make health care decisions on behalf of a patient. An enduring power of attorney is authorized to make decisions in relation to the incapable adult's financial affairs. The *Health Care (Consent) and Care Facility (Admission) Act* now governs who, in law, may make health care decisions on behalf of an incapable patient.

There may be situations where a patient's health care record may be released to an Attorney (i.e. where the Power of Attorney has been granted unrestricted powers under the Power of Attorney document, or if he/she requires the record to carry out his/her obligations as Attorney). If a Health Care Agency (HCA) is asked to release a patient's record to a Power of Attorney, we recommend it seek advice from the Health Care Protection Program (HCPP) or its legal counsel.

[1] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96370_01
[2] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96181_01

Enduring Powers of Attorney

The execution of an Enduring Power of Attorney, which contains an explicit provision indicating that the appointment of the Power of Attorney endures in the event of any subsequent mental infirmity, is effective (in the event of such subsequent incompetence) as long as the person granting the Enduring Power of Attorney was competent at the time the Power of Attorney was made. However, any Power of Attorney (including an enduring power) ends if a court order declaring the person incompetent is made under s. 3 of the *Patient Property Act*[3]. Enduring Power of Attorney also ends on appointment of a committee by court order and is suspended on appointment of committee without court order (s. 6 of the *Patient Property Act*). Should there be any inconsistency or conflict with a representation agreement made by the adult under the *Representation Agreement Act*[4], the enduring power of attorney must be followed.

Extrajurisdictional Powers of Attorney

A Power of Attorney made in a jurisdiction outside of BC may be deemed effective in BC if it meets the requirements outlined in the POAA and the Regulations to the POAA. It is in effect while or when the adult is incapable of making decisions about the adult's financial affairs.

A "deemed enduring power of attorney" is one that has been made by a resident, who was ordinarily a resident of a jurisdiction outside of British Columbia, but within Canada or within the USA, Great Britain and Northern Ireland, Australia or New Zealand. The enduring power of attorney must have been made according to the laws of the jurisdiction in which the person was a resident and the power of attorney was made. It also must continue to be effective in the jurisdiction in which it was made.

To be effective in BC, a deemed power of attorney must be accompanied by a certificate from a solicitor permitted to practice in the jurisdiction in which the deemed power of attorney was made. The certificate must indicate that the deemed power of attorney meets the requirements as stated.

A person named as an attorney and the person who made the deemed enduring power of attorney must both be at least 19 years of age. Powers or duties performed by the attorney must be lawful under the *Power of Attorney Act* or in the jurisdiction in which it was made.

[3] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96349_01
[4] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96405_01

If the HCA has any questions or concerns about a Power of Attorney which has been presented to it, please seek advice from HCPP or legal counsel.

Please refer to our Risk Note on the *Representation Agreement Act* found on the HCPP website[5].

What does a Power of Attorney document look like?

The following is a copy of a sample Power of Attorney for your interest and as a guide of the usual language which is contained in a Power of Attorney; and copy of the Certificate of Extrajurisdictional Solicitor.

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[5] https://www.hcpp.org/?q=node/17

Form 1

(Section 9)

Power of Attorney
(For the appointment of one attorney)

This General Power of Attorney is given on .....*(Date)*

by ..... *(Donor)* of ..... *(Donor's Address)*

I appoint the following person:

..... *(Name of Attorney)* of ..... *(Address of Attorney)*

to be my attorney in accordance with the *Power of Attorney Act* and to do on my behalf anything that I can lawfully do by an attorney.

This power of attorney is subject to the following conditions and restrictions:
(Cross this line out if there are no conditions or restrictions.)

WITNESSED BY:

.....

(Signature of Witness)

.....

(Print Name of Witness)

.....

(Donor)

.....

(Address of Witness)

Form 2

(Section 9)

Power of Attorney
(For the appointment of more than one attorney)

This General Power of Attorney is given on ..... *(Date)* by

..... *(Donor)* of ..... *(Donor's Address)*

I appoint the following persons:

..... *(Name of Attorney)* of
..... *(Address of Attorney)*

..... *(Name of Attorney)* of
..... *(Address of Attorney)*

(Cross out one of the following alternatives)
(who may act separately (or) who must act together) to be my attorneys in accordance with the *Power of Attorney Act* and to do on my behalf anything that I can lawfully do by an attorney.

This power of attorney is subject to the following conditions and restrictions:
(Cross this line out if there are no conditions or restrictions.)

WITNESSED BY:

.....

(Signature of Witness)

....

(Print Name of Witness) *(Donor)*

.....

(Address of Witness)

Certificate of Extrajurisdictional Solicitor

(made under section 4 of the Power of Attorney Regulation)

[to be completed by a solicitor in the jurisdiction in which an extrajurisdictional enduring power of attorney was made]

Part 1 — Identification of solicitor

1 This certificate applies to the power of attorney made ..... *[date]* by

..... *[name of adult]*, authorizing

.....

.....

[name of attorney or attorneys] to do the following:

.....

.....

.....

.....

.....

.....

[summary of the powers the attorney, or each attorney, is granted].

2 I am lawfully entitled to practise law in

.....

[name of jurisdiction, including province or state, if applicable, and country].

3 My contact information is as follows:

..... *[name]*

..... *[telephone number]*

..... *[address]*

..... *[city, province or state]*

..... *[postal code or zip code]*

..... *[e-mail (optional)]*.

4 The regulatory body that governs the practice of law in my jurisdiction is

..... *[name]*

..... *[telephone number]*

..... *[address]*

..... *[city, province or state]*

..... *[postal code or zip code]*

Part 2 — Certifications made by solicitor

1 I certify that

(a) the power of attorney described in Part 1 of this certificate grants a power of attorney that continues to have effect while, or comes into effect when, the adult who made the power of attorney is incapable of making decisions about the adult's financial affairs,

(b) at the time of making the power of attorney, the adult who made it was to the best of my knowledge ordinarily a resident of ..... *[province or state, if applicable, and country]*, and that jurisdiction is

(i) outside British Columbia but within Canada, or

(ii) within the United States of America, the United Kingdom of Great Britain and Northern Ireland, Australia or New Zealand, and

(c) the power of attorney was validly made according to the laws of the jurisdiction in which

(i) the adult who made the power of attorney was ordinarily resident, and

(ii) the power of attorney was made.

....., ... *[date]*.

.....*[signature of solicitor]*

[Provisions relevant to the enactment of this regulation: *Power of Attorney Act*, R.S.B.C. 1996, c. 370, section 41 (2) (b) and (c) and (4)]