

UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

**A HARMONIZED APPROACH TO ELDER FINANCIAL ABUSE IN
POWERS OF ATTORNEY LEGISLATION**

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[1] This Project commenced as a result of a letter received by the then President of the Uniform Law Conference of Canada, Nancy Irving, from the Honourable Alice Wong P.C., M.P., Minister of State (Seniors). In that letter, it was recommended to the ULCC that it take a comparative review of the powers of attorney in the various jurisdictions and identify possible gaps and explore the need for harmonization in this area. It was noted that there was a commitment of the Government of Canada to eliminate elder abuse in all its forms and that it was becoming particularly important to support financial decision-making in older age and increase ways to safeguard seniors against financial abuse. Particular reference was made to work of the Western Canada Law Reform Agencies, which included a recommendation to have uniform safeguards against the misuse of enduring powers of attorney. The report, [Enduring Powers of Attorney: Areas for Reform](#), is available on the Alberta Law Reform Institute website, <www.alri.ualberta.ca>. The analysis and the recommendations that follow build upon those recommendations.

[2] An agreement was executed dated March 27, 2014 between the ULCC and the Minister of Human Resources and Social Development Canada. As a phase I, a policy paper, the subject matter of this report, was to be prepared for presentation at the Annual meeting of the ULCC in August 2014. Phase II encompasses the preparation of drafting instructions and annotated material for provincial and territorial powers of attorney legislation as well as carrying out the actual drafting of the proposed legislative provisions. Phase II will be completed and presented to the ULCC at its meeting in August 2015.

[3] The ULCC is required to work with its established and expert network throughout the analysis, validation and drafting processes using well-established contacts and engage the provinces and territories throughout the development of the policy paper and the drafting instructions. As to this point, the ULCC has a well-established process for review of all proposed projects, first through the review of a proposal by the Advisory Committee on Program Development and Management (ACPDM), which committee has a broad regional representation and whose membership is made up of senior delegates to the Conference as well as past Presidents. Second, the proposal, once passed the ACPDM, is brought forward to the Steering Committee of the Civil Law Section of the ULCC for approval. The Steering Committee is made up of Jurisdictional Representatives that represent every jurisdiction in Canada. Both of these reviews have taken place and approval at both levels was received with respect to this project. The next step would be for the presentation of this Report to the all of the

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delegates attending the Conference in August 2014 with a view to seeking approval of the policy recommendations in order to proceed to Phase II. It is anticipated that all jurisdictions will be represented at the August 2014 meeting.

[4] On another level, the project impacts Public Guardians and Trustees in a number of specific ways, but particularly in the area relating to a forum for complaint and investigation. As a result, efforts are underway to attempt to engage the Public Guardians and Trustees for the provinces and territories in relation to this project.

[5] The abuse of older adults remains an often hidden but serious social problem that affects the lives of hundreds of thousands of seniors in Canada. To date, the Government of Canada has taken action to address elder abuse.

[6] On January 13, 2013, an amendment to s. 718.2 of the Criminal Code came into force. This amendment added clause (a)(iii.1), which makes evidence of significant impact on a victim, considering the victim's age and other personal circumstances including their health and financial situation, a factor in a court's imposition of a sentence.

[7] A prevalent specific form of elder abuse is financial abuse. On June 16, 2014, the Senate passed Bill S-4 and it was introduced in the House June 17, 2014. Bill S-4 makes amendments to the Personal Information Protection and Electronic Documents Act and to the Digital Privacy Act. These amendments will permit the disclosure of certain personal information for the purposes of preventing fraud and protecting victims of financial abuse.

PROVINCIAL AND TERRITORIAL MEASURES: POWERS OF ATTORNEY

[8] Studies have shown financial abuse constitutes as much as half of all elder abuse and that the law has been less effective in this respect than in respect of, for example, physical elder abuse.¹ Parts of the Criminal Code create specific offences that can be accessed in the event of financial abuse. For example, Part IX, *Offences Against Rights of Property*, addresses theft and specifically theft by a person who holds a power of attorney in respect of the subject property. As well, Part X, *Fraudulent Transactions Relating to Contracts and Trade* details offences relating to fraud, including through misuse of identify information, falsification of records, and contract breaches that constitute criminal activity, and it also creates certain restitutionary remedies.

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[9] Despite the content of criminal law and the availability of recourse to it, measures that can prevent financial exploitation or address it without recourse to criminal proceedings can be practical and effective. Individuals, including older adults, can make valuable use of financial planning tools and assistance. Instruments individuals may use to support financial planning and decision-making include powers of attorney. A power of attorney is a written, legal authorization to represent or act on another's behalf in private affairs, business, or some other legal matter.

[10] Powers of attorney are an application of the law of contract and agency. Provincial and territorial legislation establish rules about their use and their function when the person who grants the power becomes incapacitated.

[11] Importantly, misuse of this instrument can put seniors at serious risk of financial abuse. Careful measures surrounding the creation of powers of attorney and the conduct of the attorney can assist in the prevention of financial exploitation.

[12] However, the content of legislation governing powers of attorney varies among the jurisdictions of Canada. The differences amongst provincial and territorial legislation on powers of attorney can create misunderstanding, confusion, and uneven safeguarding of individuals' interests. This poses challenges to the identification of areas for improvement. For example, portability is an important feature of enduring powers of attorney. Once created, an enduring power of attorney might be legislated or agreed to be portable—that is, to have effect in a jurisdiction other than that in which it was created. However, advantages of portability can be lost if there is little harmony in the legislation of the relevant legislation of the jurisdictions. Different explanations of duties, availability of recourse, and extent of supervision, for example, can generate confusion for both donor and attorney.

[13] Likewise, and as is detailed below, existing legislation among the jurisdictions does not contain specific provision or mechanisms to prevent abuse and exploitation. Development of enduring power of attorney legislation through the years has focused on the creation of this tool to aid a person in managing his or her affairs, particularly in the event of incapacitation. However, little if any legislative attention has been directed to measures that would prevent abuse of this tool.

[14] The following analysis of provincial and territorial powers of attorney and related legislation, detailed in the Appendix, highlights the similarities and distinctions among

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the jurisdictions. It also points out useful formulations used in some jurisdictions. This analysis, read in the context of areas identified as exposed to exploitation, will inform the preparation of drafting instructions that could be adopted to foster improved financial planning and decision making. This, it is hoped, will in turn reduce the incidence of financial abuse.

POWERS OF ATTORNEY LEGISLATION

[15] As noted, a power of attorney is simply a type of agency agreement in which one person, the donor, appoints another, the attorney, to do what the donor has the legal right to do.² At common law and under the Civil Code of Quebec, the power of attorney is effective only so long as the donor retains mental capacity. However, legislative solutions were developed to allow a donor, while of mental capacity, to make use of a power of attorney instrument for planning purposes³. Pursuant to legislation, a donor may set up an enduring or continuing power of attorney, which will provide that the instrument will continue in effect during a time of the donor's mental incapacity. Similarly, a contingent or springing power of attorney will take effect only upon that incapacity, and, in Quebec, a mandate in anticipation of incapacity will take effect when the mandator becomes incapacitated.

[16] These legislated solutions vary considerably in several ways. In Quebec, the Civil Code provides for a mandate and a mandate in anticipation of incapacity⁴. The Quebec mandate solution is substantially similar in effect to the enduring power of attorney solutions in other jurisdictions. Harmonized legislative reform certainly can encompass amendment to the relevant portions of the Civil Code. In most jurisdictions, powers of attorney and enduring powers of attorney are provided for in a Power of Attorney Act. In Newfoundland and Labrador, the Enduring Powers of Attorney Act⁵ gives legislative effect to a power of attorney instrument after incapacity. In Ontario, the continuing power of attorney falls within legislation governing substitute decision-making, including financial matters.⁶ And in New Brunswick, provisions related to powers of attorney are found in other legislation.⁷ In this jurisdiction, harmonized legislative reform might present as enactment of an entirely new statute and overview of existing legislation to ensure legislative and administrative consistency throughout the jurisdiction.

[17] Though the purpose and function of these legislative solutions are similar, they take some different approaches. Some of the differences are the result of legislative reform in certain jurisdictions, and others seem simply the outcome of different chosen approaches.

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In other cases, for example in many aspects of Saskatchewan's power of attorney legislation and some provisions of the Manitoba and British Columbia, it may be that legislative reform is significant and useful but has not yet had the practical impact or administrative framework needed to minimize the risk of power of attorney abuses.⁸

[18] Canadian power of attorney and enduring power of attorney legislation, broadly considered, also shares structural frameworks with other, non-Canadian common law jurisdictions. If we look at power of attorney legislation in Canada and in other jurisdictions from the perspective of safeguards for the donor, we can identify at least four elements common to various statutes. The statutes of different jurisdictions are constructed with a greater or lesser degree of detail and flexibility. Jurisdictional differences are challenges inherent in any harmonization effort. Once again, legislative reform with a view to harmonization among the jurisdiction will create a framework that overcomes unnecessary variations in detail and flexibility. This, in turn, is expected to have the advantageous practical outcome of greater certainty and consistency among the jurisdictions. A simple practical example of such advantage is an improved portability of the enduring power of attorney as a planning tool. Portability, with embedded safeguards flowing from improved and harmonized legislation, will reduce confusion, increase certainty, and enable mobility among the multiple Canadian common law and civil law jurisdictions.

EXISTING PROVISIONS AS POTENTIAL SAFEGUARDS

[19] For this part of the analysis, we can look at provisions relating to, for instance, the creation of the attorney–donor relationship and the formalities required; the expression of the duties of the attorney; requirements for accounting; and questions of interaction with a public office such as a public guardian and trustee. A fifth element is termination of the power of attorney. Termination obviously can provide relief by bringing a sour power of attorney relationship to an end, but it may not be of assistance in preventing abuse or to put an end to it quickly.

[20] *Creation of the power of attorney:* Provisions relating to creation of the power of attorney are the first point at which safeguards can be introduced. Because of their nature and their departure from the common law or Civil Code mandate, it will be observed that formalities will be more specific and extensive for enduring powers of attorney than for general powers of attorney. Nevertheless, abuse is possible in the case of either.

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[21] As can be observed from the legislative table in the Appendix, the formal requirements for a power of attorney vary considerably among the provinces and territories. Most jurisdictions have enacted specific legislation to permit and establish some rules for enduring or springing powers of attorney. Specific legislation clearly enables a donor, at minimum, to grant an attorney powers via an instrument that would continue to have effect even upon the donor's incapacity. The level of detail in the statutes varies, however. In some jurisdictions, little is expressed on the matter of formalities for the creation and recognition of the instrument. Others prescribe forms for enduring power of attorney instruments.

[22] In most jurisdictions, the relevant statute sets out the duties of the attorney, but the level of specificity varies among the jurisdictions. In some jurisdictions, the duties are expressed as fiduciary or in plain words that describe fiduciary obligations. In other jurisdictions, the fiduciary nature of the attorney's duties derives from judicial interpretation drawing upon principles of trustee law. In some, the duties are fairly detailed; in others they are nearly bare. For example, in New Brunswick, where the general power of attorney provisions relating to property are embedded in the Property Act⁹, little is specified. The same can be said of the power of attorney provisions relating to personal care in the Infirm Persons Act.¹⁰ At the other end of the spectrum is the Yukon Enduring Power of Attorney Act¹¹, which contains detailed and quite specific rules for the creation of an enduring power of attorney, including legal advice and the inclusion of a prescribed Schedule of explanatory notes. In British Columbia, the duties are not only highly specific, but are also expressed in plain language.

[23] The majority of the jurisdictions contain provisions somewhere in the middle, with some variations about who may be witnesses and when signing must occur. Some jurisdictions supply an optional form for the creation of an enduring or continuing power of attorney.¹²

[24] It has been observed that, though formalities at the stage of creation of the instrument are an important first safeguard, where the rules and formalities are so highly specific and extensive as to be onerous, they might not be understood or respected, which could in fact defeat their value as a safeguard.¹³

[25] It is suggested that, to increase the likelihood of successful safeguard at the point of creation of the power or attorney relationship and instrument, a provision such as that used in the British Columbia Power of Attorney Act, RSBC 1996, c 370, ss 16

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through 18. The rules are specific and require some measure of detail to ensure the arrangement is not entered into hastily. Moreover, the clear, plain language drafting of the provisions reduces the risk that it be seen as too onerous. This is highly appropriate to the subject.

[26] *Expression of duties.* A second point at which a safeguard is introduced is in the legislated expression of the duties of an attorney. Clear communication that the relationship between attorney and donor is a fiduciary one, and the nature of the obligations this relationship entails, will ground an attorney's good-faith performance of those duties.

[27] The British Columbia Power of Attorney Act¹⁴ is a useful model in this respect also. The stated duties are clearly fiduciary but are expressed in plain language and in detail over several provisions. They make clear what the attorney must do and cannot do. Some jurisdictions, such as Manitoba, also expressly set out the respective standard of performance of their duties by attorneys who are paid and those who are not. This clear differentiation may help prevent inadvertent exploitation or careless execution of the attorney's duties.

[28] *Accounting.* The standard measure of monitoring or supervision of an attorney's execution of duties is in the responsibility to provide an accounting. Again, there is variation among the jurisdictions that expressly provide for an accounting, both in the circumstances when this step is required, at whose initiative, and to whom the accounting is given. The default or basic provision requires an application to the court by the donor or an interested person on the donor's behalf. Further relief follows from a clear statement that the ability to apply for an accounting cannot be waived.

[29] A provision that enables a court to order, on application, that the attorney present accounts has been held to encompass the ability of the court to make a remedial order.¹⁵ This is an important interpretation of an essential corollary which should be included in any legislated expression of an obligation to make an accounting.

[30] A difficulty, however, is that it does require the applicant—the donor or and interested party on the donor's behalf—to engage in court proceedings. If the donor is already subject to financial exploitation, the thought of costly and time-consuming court proceedings may not be an appealing option.¹⁶ Of some assistance are accounting provisions that involve a public office like a Public Guardian and Trustee.

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[31] *Public Guardian and Trustee: accounting; repository; financial measures.* It can be a helpful approach to engage the Public Guardian and Trustee, or equivalent office in the jurisdiction, in legislative provisions addressing an accounting or any other remedy. For instance, in British Columbia, any person can—without fear of damages—make a good-faith report of suspected abuse or neglect to the Public Guardian and Trustee. It then is incumbent upon that office to review the report and take any of a number of steps that it sees appropriate on the findings.¹⁷ This conceivably relieves some of the apprehension a donor or interested person may have about litigation.

[32] It can be considered whether The Public Guardian and Trustee or Public Curator (Public Guardian and Trustee, for simplicity) can be engaged further. Some jurisdictions—for example, BC, Manitoba, Ontario, and Saskatchewan, and the Yukon contemplate the potential involvement of the Public Guardian and Trustee to a greater or lesser extent throughout the process of creation of a power of attorney (which, in some jurisdictions, can expressly designate the Public Guardian and Trustee as attorney) and oversight of the relationship.

[33] In jurisdictions that have a robust such office, there is opportunity to go further. For instance, in Manitoba it is optional¹⁸ to deposit an executed enduring power of attorney, at least, with the Public Guardian and Trustee. The intersection of the Power of Attorney Act with another statute, the Vulnerable Persons Living with a Mental Disability Act¹⁹ may have some bearing on that provision. This step would operate as something of a safeguard, in that an agency would have knowledge of the enduring powers of attorney out there.

[34] Limitations, of course, would include the vast number of powers of attorney in place at any time. To require registration of all of them and to track their operation would be an administrative burden that even a highly robust Public Guardian and Trustee office would find a challenge to maintain. Another serious limitation, if deposit or registration is mandatory, is the potential inadvertent invalidation of powers of attorney that are not registered, which seems a highly likely outcome.

[35] To provide for an optional system of deposit of enduring powers of attorney, as Manitoba has done, may be an achievable first step, however. Implementation of such a system and its evaluation could lay the groundwork for an examination of the utility of a central repository.

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[36] The involvement of the Public Guardian and Trustee has another extremely valuable potential outcome. In some jurisdictions, the Public Guardian and Trustee has the power to freeze or protect assets in urgent cases.²⁰ This legislative power could be seen to join effectively with an oversight role in the power of attorney sphere.

[37] Thus, in some jurisdictions the involvement of the Public Guardian and Trustee is already contemplated in or threaded through power of attorney legislation. The constitutive legislation specifically provides that the office has the power to exercise a protective measure, in appropriate cases, such as to freeze or protect assets. In these jurisdictions, a remedial measure to prevent financial abuse or exploitation by attorneys seems a logical leap. On the other hand, it is not apparent that all jurisdictions benefit from a robust Public Guardian and Trustee office. Those jurisdictions would require considerable expansion of the legislative framework of that office for this oversight or remedial ability to be considered.

IMPLEMENTING FURTHER SAFEGUARDS

[38] So each one of these areas can and does offer an opportunity to establish a safeguard of the interests of a donor under a power of attorney and, particular, under an enduring power of attorney. Nevertheless, abuse continues to be observed,²¹ and often is conduct that is difficult at present to control, to prevent, or to support a criminal remedy.

[39] The problem of the potential of abuse of the enduring power of attorney is well documented in Canada. Misuse has been observed in other jurisdictions as well. For instance, in 2001 The Law Commission of New Zealand identified a number of elements of the enduring power of attorney instrument exposed to abuse, and these encompassed the four areas discussed above.²² For instance, discussing the absence of safeguards, the report noted legislation then in place then did not require filing of accounts or independent monitoring of the attorney, and did not monitor the classification of a donor as incapable.²³

[40] Moreover, one can also observe, when considering judicial interpretation of enduring power of attorney provisions, that courts may find current legislation does not uniformly offer sufficient guidance and sufficient clarity about the rights and duties an enduring power of attorney confers. Courts also may not find they have available legislative remedies to readily direct the control of abuse. One can see the basis for

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concern, if the instrument itself was developed with a goal to allow better management of affairs after incapacity. It can be seen from case law examples that a variety of enduring power of attorney questions have seen resort to litigation across the jurisdictions. The first paragraph below describes the challenges the current state of legislation poses to courts. The next paragraph illustrates the specific issues that are litigated in cases involving enduring powers of attorney, again across jurisdictions.

[41] A study of a sampling of the Canadian enduring power of attorney jurisprudence shows that courts have engaged a variety of judicial reasoning techniques to achieve a remedy that is just in the circumstances. Courts have undertaken expansive interpretations of certain provisions and restrictive interpretations of others (*Re Burling Estate*; *B.F.H. v D.D.H.*); have looked to the legal literature and jurisprudence and legislative interpretation from other provinces with sometimes dissimilar legislation (*Re Burling Estate*; *Huzel v Habing (Estate of Agnes Johnson)*; *Re Taubner Estate*); *E.B. v S.B. and B.K.*; *Re Taubner Estate*); and have wrestled with missing factual details (*Re Burling Estate*; *Huzel v Habing (Estate of Agnes Johnson)*; *E.B. v S.B. and B.K.*).

[42] Many cases focus on questions about the appropriate conduct of the attorney and the attorney's duties as fiduciary (*E.B. v S.B. and B.K.*; *Re Sangha*; *B.F.H. v D.D.H.*; *Re Ericksen Estate*; *Re Taubner Estate*); remuneration entitlements (*Re Burling Estate*); whether proper records were kept or other matters of accounting as duty or as remedy (*Huzel v Habing (Estate of Agnes Johnson)*; *E.B. v S.B. and B.K.*; *B.F.H. v D.D.H.*); on the point at which the donor was no longer of capacity (*Re Taubner Estate*; *Huzel v Habing (Estate of Agnes Johnson)*; *E.B. v S.B. and B.K.*; *Re Sangha*; *B.F.H. v D.D.H.*; *Re M.M. (Dependent Adult)*; *Clapperton Estate v Davey*; *Begg v Begg*); sufficiency of evidentiary foundations for misconduct (*E.B. v S.B. and B.K.*; *B.F.H. v D.D.H.*; *Re Taubner Estate*; *Begg v Begg*); and appropriate remedies for misconduct, including termination and substitution of attorney, passing of accounts, and restitution (*Huzel v Habing (Estate of Agnes Johnson)*; *E.B. v S.B. and B.K.*; *B.F.H. v D.D.H.*; *Re M.M. (Dependent Adult)*; *Re Taubner Estate*).²⁴

[43] Any litigation at all is troublesome for the parties, and is generally undesirable. Where the subject of the litigation is a legal and planning tool meant to provide certainty and simplicity in the arrangement of one's affairs, resort to litigation is yet further undesirable. The need is apparent, then, that these measures be legislatively expanded or enhanced to prevent abuse. Noting again, for example, the portability of the enduring

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power of attorney, the benefits of this reform should be achieved in a harmonized way across jurisdictions.²⁵

[44] *Clear expression of the duties of the attorney, their fiduciary nature, and the standard to which the attorney will be held.* An attorney may point to inadvertence as a justification for action or inaction in the interests of the donor, and the ability of a court to remedy the attorney's conduct may be highly fact-dependent. As well, absent from the various legislative schemes is a monitoring opportunity, or at least a mandatory one. And notably absent from power of attorney legislative structures are specific remedial provisions, for example, in the nature of the temporary freezing schemes of some public guardian legislation.

[45] It has been observed that “increased awareness by attorneys of their duties is likely to decrease the risk of misuse of authority because informed attorneys are likely to be vigilant attorneys.”²⁶ Thus, to minimize the potential for misuse of a power of attorney by inadvertence or neglect, it is essential that all Canadian legislation that contains provisions that enable the creation and use of an enduring power of attorney expressly provide that the attorney acts in a fiduciary capacity.²⁷ Whether this is done in plain language as in BC, or with express use of the word “fiduciary,” or by reference to the duties and powers of a representative or trustee, for example, can be left to discussion. What is essential is that there can be no room for argument on the part of an attorney that he or she was unaware of the nature of the duties conferred by the power, and that the interests of the donor are the only interests that will govern the attorney's conduct.

[46] It was described above and is demonstrated in the Appendix that similarity exists among several jurisdictions in the expression of the specific duties of the attorney, whereas some jurisdictions provide little detail at all. BC uses a plain language expression of the duties of the attorney, and some offer or prescribe an optional form of wording. Uniformity of expression and specification of duties among jurisdictions would reduce misunderstandings, permit consistency in application and judicial recourse, and maximize the value of portability of powers of attorney.

[47] The nature and purpose of the instrument, and the considerable authority it can confer to the attorney over the affairs of the donor without the donor's scrutiny, require any specific legislated content to be as free from misunderstanding as possible. It is essential that any specific legislated content be drafted in recognition of the need to

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minimize inadvertent misconduct and limit assertions by the attorney that his or her duties were misunderstood.

[48] Thus, it is recommended that some specifics of the attorney's duties be common to all jurisdictions and be expressed in plain language and that legal terminology that has the potential of creating or supporting a claim of misunderstanding be avoided.

[49] A plain language expressed list of the attorney's duties that arise or continue upon the donor's capacity should reflect duties that are already legislated in many jurisdictions. For example, instead of providing simply that the attorney is a fiduciary (or, as in some jurisdictions, leaving this to be inferred²⁸ by analogy), legislation can provide that the attorney will act honestly, in good faith, and in the best interests of the donor.

[50] To reflect and respect the autonomy and continued interests of the donor despite the donor's incapacity, the duties should also express that the attorney must consider any known wishes of the donor along with any information about the donor's own manner of managing the affairs while competent. Crucially, a statutory list of duties must express that the attorney must use the donor's assets for the benefit of the donor. This is an expression of a component of the fiduciary duty that will prevent, for example, an attorney who might be a future testamentary beneficiary from attempting to preserve the estate while neglecting the needs of the donor.

[51] A duty provision should also clearly spell out the reasonable duty not to co-mingle: that the attorney is to keep the donor's property and funds separate, except as specifically otherwise permitted. The record-keeping function should also be clearly set out: to keep records of financial transactions with expression of the need to provide details of them if required.

[52] Power of attorney legislation also should be uniform in the clear and plain expression of the standard of care to which the attorney will be held in carrying out the duties accorded by the power of attorney, which may simply be the common law standard. For example, the attorney can be said to be held to the standard of a prudent person in reasonable circumstances and having comparable experience and expertise. Again, the present BC legislation can be a reference.

[53] Expectations for remuneration and reimbursement can also be expressed in the standard. For instance, to minimize uncertainty and to preclude inadvertent misconduct,

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legislation should clearly set out that the attorney will not receive remuneration from the donor for undertaking the role of attorney, unless the enduring power of attorney instrument expressly authorizes this and the basis upon which remuneration is permitted. The standard can also set out, on the other hand, that the attorney may be reimbursed from the donor's property for reasonable expenses that were incurred in carrying out the duties of attorney.

[54] A statement of appropriate limitation of the attorney's liability can further clarify the expectations of the attorney and interested persons while also specifying a standard of conduct for the attorney. Legislation can assure the attorney that he or she will not be personally liable for loss or damage to the donor's property or affairs so long as the attorney complies with the statutory duties of an attorney, any court order or directions, and the provisions of the enduring power of attorney instrument itself.

[55] *Notice, acknowledgment, and acceptance of the attorney's duties, and the incapacity of the donor.* To be of value and reliable, communication of the fiduciary role must incorporate a mechanism for ensuring the attorney understands, acknowledges, and accepts these duties and the standard of conduct to which he or she will be held. To this end, legislation should provide a mechanism of notice and acknowledgment. To be held to the standards of the role, an attorney must be understood to be aware of and willing to accept the duties under an enduring power of attorney.

[56] The Western Law Reform Agencies in 2008 reported an evaluation of several possibilities and options for such a mechanism.²⁹ It was suggested the most appropriate time for notice and acknowledgement and acceptance of duties to be required is when the donor becomes incapacitated. This makes sense. It supplies the necessary information to third and interested persons and reduces formalities that may prove not to be required. This will be the time the attorney henceforth would be acting for an incapacitated donor under an enduring power of attorney. In the case of a springing enduring power of attorney, the fact of the donor's incapacity results in the attorney commencing to act. To require notice only at this stage avoids potentially unnecessary formalities at the time of creation of the enduring power of attorney.

[57] The New Zealand Law Commission in 2001 considered the absence of a mechanism to establish the attorney's authority to act and the challenges posed by the resulting lack of clarity for the attorney, the donor, and third persons. The recommendation was to require a solicitor's certificate, in some circumstances only. The

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recommendation centred on uncertainty about the capacity of the donor at the time the power of attorney was created, or at the time the attorney assumed responsibility for the donor's affairs. For reasons similar to those explained in respect of unnecessary formalities, a solicitor's certificate was not recommended at the stage of creation of an enduring power of attorney while the donor is still of capacity.³⁰

[58] A purpose, then, of a legislated mechanism of notice to, and acceptance by the attorney of the duties he or she undertakes upon the incapacity of the donor of an enduring power of attorney is to establish the attorney's awareness and understanding of the obligations of the role. Perhaps more important is notice to relevant others that the attorney is now acting for an incapacitated donor and therefore henceforth without the donor's scrutiny of the attorney's activities on the donor's behalf. Again, a reasonable period after the moment of declaration of the donor's incapacity is the convenient time for notice to these other interested persons. This is, by the instrument's nature, the signal that a springing enduring power of attorney takes effect. And, as noted, the time of the donor's incapacity is the time for others to be aware that the attorney is now acting without the oversight of the donor.

[59] The advantages of notice or, further, registration of enduring powers of attorney or activated springing powers of attorney, have been pointed out elsewhere. The Law Commission of New Zealand, for example, pointed out that a system of registration or indexed central register would give certainty to third persons about the attorney's authority and would track multiple and potentially incompatible power of attorney instruments. That body cited loss of privacy and administrative expense as reasons to not prefer a formal registration system.³¹

[60] A legislated mechanism of notice that the attorney is now acting for the donor without the specific instruction or ongoing scrutiny of the donor must specify how notice should be delivered and to whom. When creating an enduring or springing power of attorney instrument, the donor should be able to designate any persons who should receive notice. The donor's family members, financial institutions, and any persons responsible for aspects of the donor's care are all also potentially interested persons. To fully respect and protect the autonomy of the donor, the donor as well should be considered an interested person for the purpose of notice.

[61] In 2006, the Law Reform Commission of Ireland commented on that country's existing enduring power of attorney legislation and specifically the notice requirement.

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Its report affirmed “the importance of the notice requirement as part of the system of checks and balances in connection with” the enduring power of attorney instrument.³² The report recommended further integration with a proposed Office of the Public Guardian, which would register executed enduring powers of attorney, and take on supervisory and monitoring functions as well.³³

[62] It was also noted above that some present Canadian legislative mechanisms provide for a role of the Public Guardian and Trustee. It also should be considered whether, or in what situations, the Public Guardian and Trustee or similar public office (as is discussed further below) be given notice of the donor’s incapacity and the attorney’s consequent acting. Such public office can be designated in the legislation as a recipient or registry of notice, if no other persons are named. The attorney must be legislated the responsibility to provide specified individuals, members of the donor’s immediate family, or in the absence of anyone in those categories, at least that designated office with notice that the attorney is now acting independently under the enduring power of attorney.

[63] To be effective and to offer protection to the donor and to third persons, notice requirements must not be waivable in an enduring or springing power of attorney instrument. Legislation must provide that no donor can waive a requirement that the attorney give notice to the persons specified that the attorney is now acting independently and without the scrutiny of the donor, within a reasonable period of the declaration of the donor’s incapacity.

[64] Recall that the notice has multiple purposes: to reiterate to the attorney the attorney’s duties and their fiduciary nature as statutorily expressed in plain language, and to notify others that the attorney has these duties and is now exercising the enduring power of attorney responsibilities without the direct scrutiny of the donor. It is prudent, then, that a notice specify the statutory duties of the attorney, and that it contain the attorney’s express acknowledgment of these duties and acceptance of the responsibility. For this purpose, it can be helpful for regulations or a schedule to provide an optional form of notice, or for the statute to enunciate the minimum required contents.

[65] *To keep and provide an accounting.* As discussed earlier, there is potential for a helpful safeguard in the accounting duties already present in some jurisdictions and suggested above as a duty to be uniformly expressed. For the keeping of accounts to be a valuable safeguard, and to engage this duty as a potential supervisory or monitoring mechanism, legislation must set out what records the attorney keeps and what is to be

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done with them. As noted, jurisprudence recognizes the utility of the duty rests not simply and solely on the keeping of accounts, but also on the potential of those accounts to support a remedy.³⁴

[66] Without even going so far as looking for a remedial purpose, one can see differences among the jurisdictions in whether accounting is merely a record-keeping duty or also the basis for a supervisory function. This is not to minimize the record-keeping function; indeed, this function preferably will have been set out among the attorney's statutory duties.³⁵

[67] To extend this record-keeping function to ground a supervisory safeguard, though, legislation at minimum should specify the persons or office to whom the attorney must account, precisely what, and when or in what circumstances. This is obviously crucial where a duty only exists to report or present accounts to the donor, and the donor has reached incapacity. As the Appendix shows, some jurisdictions provide for a minimal, passive reporting on the request of certain persons or as an outcome of a court order. On the other hand, the Manitoba legislation requires annual reporting to certain persons as set out in the statute, and the Saskatchewan statute suggests the form and content of an accounting report.

[68] Observed, reported, or litigated incidents of misconduct or inappropriate handling by attorneys of their donors' property suggests a mechanism that requires the attorney to provide accounts only after investigation or court order will be insufficient. This will operate too late to function as a useful safeguard, although the remedial value remains. Certainly, as discussed, a duty to provide accounting only to the donor would be of little protective utility. A question is whether to require the provision of accounts only on the request of specified persons would be insufficient and, conversely, whether a requirement for mandatory reporting to specified persons would be excessively burdensome to the attorney.

[69] Thus, the question of which persons uniform legislation should entitle to receive an accounting, and when, requires a careful answer. It may be that certain persons, such as immediate family members or caregiver form the circle of persons automatically entitled to annual accounting, as provided at present in Manitoba. This would provide more supervision and oversight. However, as was discussed earlier in respect of formalities, to require too much might result in slips and inadvertent failure to meet the accounting standard. If there is evidence that this higher standard of oversight in Manitoba is

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correlated with a reduction in reports of misconduct, this would be a useful mechanism. If not, automatic or mandatory reporting without a need for request might not truly be beneficial as a safeguard and instead might be an overburden on attorney and interested person alike.

[70] The context of a legislated duty to provide accounts also must be considered. What will be at issue is the management of the affairs of one person—who may be incapacitated—by another person, who may be a relative and reported to other immediate family members, financial institutions, and even a public office like a Public Guardian and Trustee. Thus, interests of the donor’s privacy also must be weighed against the interests of transparency, accountability and oversight of the attorney’s activities.

[71] In weighing these competing interests, one must remember the purpose of legislative provision will be to establish minimum standards and to create accountability requirements and safeguards against abuse. A donor and attorney may agree, in the enduring power of attorney instrument itself, to expand the reach of the accounting requirements. In this context, a preferable balance will favour the donor’s privacy interests and less burdensome duties of the attorney, while still emphasising the need for accountability and transparency.

[72] It is suggested that uniform legislation clearly require the attorney to provide a reporting of the accounts the attorney has kept to immediate family members on their request, as well as to any other persons the donor has named. Those other persons could, of course, include a financial institution or caregiver, as the parties agree, though a statutory minimum requirement may be less inclusive. Further, as is currently legislated in some jurisdictions, uniform legislation should continue to permit defined interested persons to ask a public office such as the Public Guardian and Trustee to direct financial transaction details to apply to a court for such a direction, in circumstances that support the best interests of the donor.

[73] Other jurisdictions also have favourably considered a role for a public office. The Law Commission of New Zealand, for example, suggested a new “Commissioner for the Aged,” as a champion for older people. The powers of this commissioner, in relation to enduring powers of attorney, would include applying on behalf of a donor to a court for the exercise of supervisory powers or for any other general relief available in respect of enduring powers of attorney.³⁶

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[74] The Law Reform Commission of Ireland offered a general suggestion in a 2006 report that attorneys appointed under enduring powers of attorney be subject to the overall supervision of a proposed Office of the Public Guardian, and the supervision contemplated accounting responsibilities. The report recommended specifically that one of the attorney's responsibilities should be to submit accounts of the donor's affairs either to that office or to a person designated by that office or by the donor. Specific record-keeping duties including to not co-mingle assets were suggested.³⁷

[75] *Legislated remedial powers relating to reporting misconduct, prevention of abuse and protection of assets by freezing accounts, and to investigate.* A clear expression of the fiduciary role of the attorney must be accompanied with a clear expression of the consequence of error in the role, without excuse of inadvertence. The nature of the remedies that will flow—which, to some extent will exist already in the legislation of some jurisdictions—may be fact or context-dependent. Earlier the existing remedial recourse in some jurisdictions to the Public Guardian and Trustee was noted. In other jurisdictions resort to the court for termination might be the only remedy specifically provided for.

[76] A remedial provision responds to a situation that calls for, that gives rise to the remedy. As discussed above, a clear expression of the fiduciary nature of the role of attorney, together with specifically enunciated legislated duties, lays the foundation. The transparency permitted by an attorney's accounting duties further supports a rather expedient evidentiary foundation. An interested person (discussed more fully below) who suspects financial exploitation or abuse of the donor's property by an attorney will need a mechanism to bring the concern forward, and the mechanism itself should enable a halt to be put to suspected abuse.

[77] It was explained earlier that, in some jurisdictions—BC, Yukon, Saskatchewan—the legislation governing the Public Guardian and Trustee specifically provides strong remedial powers—to freeze or protect assets in urgent cases. In Saskatchewan the Public Guardian and Trustee may seek the freezing of funds for a brief period (five days) by a financial institution, may itself freeze funds for a longer period (30 days), and may investigate allegations of wrongdoing³⁸ in situations that extend to protection from misconduct under an enduring power or attorney. This mechanism is not uniformly available in public trustee legislation. It is likely that some jurisdictions may be resistant to according this extent of oversight responsibility and remedial power—along with the resources to support it—to the office.

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[78] The current remedial scheme in the Saskatchewan Public Guardian and Trustee legislation³⁹ is a useful reference for remedial opportunities in respect of enduring powers of attorney. The relevant provisions in that statute apply not specifically or only for the benefit of incapacitated donors under enduring powers of attorney, but rather for anyone defined as a “vulnerable adult.” The provisions define the financial abuse that can be the suspected, and it is defined specifically yet broadly to mean misappropriation of funds, resources, or property by fraud, deception, or coercion. Suspicion alone, on reasonable grounds, of financial abuse can give rise to a temporary remedy: There is no requirement to wait for court proceedings before the Public Guardian and Trustee or the financial institution can act to protect the donor’s assets. And a financial institution can act on its own motion to freeze assets in a very temporary way in the event of reasonable grounds to believe financial abuse exists. The period of suspension can be longer if the Public Guardian or Trustee holds this reasonable belief or where it receives an allegation of financial abuse. The Public Guardian and Trustee also has the authority to investigate allegations of financial abuse.

[79] As noted above, extension of existing remedial recourse in some jurisdictions to the Public Trustee or Public Trustee and Guardian may not be feasible because this may require significant alteration to existing legislative schemes for those offices. But people who are aware of or suspect financial abuse, exploitation, or misconduct should have a place to report it. Further, when they make a report in good faith and on reasonable grounds, they must be protected from intimidation and must not be exposed to damages for doing so. That is, whatever is the venue or body that will receive the report, the protections offered by the system of reporting of abuse or misconduct should mirror those currently in place in BC, where persons can report misconduct to the Public Guardian and Trustee with these protections.

[80] The public official who is granted the power to receive reports of financial abuse should also have strong and active remedial powers similar to those available in Saskatchewan, reviewed above. The power to temporarily freeze accounts or to have a financial institution freeze funds for a very brief period will protect the donor’s property and enable appropriate investigations by the public office. This recommendation was made by the Western Canada Law Reform Agencies in 2008⁴⁰ and is echoed here for national uniformity.

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[81] There is a possibility of limitations posed by resources and workload of the Public Guardian and Trustee or, indeed, of a new and separate oversight office that might be established under enduring power of attorney legislation. For this reason, for reasons of privacy, or for various other imaginable reasons, a person reasonably suspecting misuse of an enduring power of attorney may prefer to make an independent application for a remedy, such as termination of the appointment of the attorney. Any legislative scheme for reporting and remedy should permit this.

[82] It should be noted that protection of the donor's interests may require not termination of the enduring power of attorney instrument altogether but, rather, termination of the appointment of the misbehaving attorney and appointment of a new one. This should be within the remedies available under uniform legislation, to allow continuity of management of the donor's affairs as the donor intended, without misuse.

[83] To summarize, recommendations for remedial provisions relating to freezing of funds should largely echo those presented by the Western Canada Law Reform Agencies in 2008. A public official should be designated to receive and act on reports of misconduct under an enduring power of attorney. Though the Saskatchewan scheme is a good model, oversight and remedial powers in respect of enduring powers of attorney need not, and should not, be uniformly through the office of the Public Guardian and Trustee. As discussed in the earlier legislation review, that approach would require overhaul of Public Guardian and Trustee legislation—which doesn't uniformly even exist across jurisdictions—simply for the purpose of protecting assets under enduring powers of attorney. Instead, enduring power of attorney legislation can vary in respect of who is designated as a public oversight authority.

[84] A page can also be taken from the 2006 report of the Law Reform Commission of Ireland. That report recommended, in addition to guidance and supervisory functions in a proposed Office of the Public Guardian, an educative role of the financial regulator. That is, the financial regulator should promote awareness among financial institutions of the status of accounts of donors of enduring powers of attorney.⁴¹

[85] It is important for the effectiveness of any remedy designed to protect the property of the donor that a person who reports in good faith be protected from action or other proceeding. Of course, where allegations of misuse of power or misconduct by an attorney is not brought in good faith or does not rest on reasonable and probable (even if incorrect) grounds, the protection will not hold. The public official who is designated to

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receive reports, like the Public Guardian and Trustee in Saskatchewan, should have the discretion and authority to respond by investigating any suspected misuse of the enduring power of attorney. Suspected breach of at least one of the delineated duties of the attorney should give rise to an investigation by this designated official.

[86] The investigative authority of this designated public official should follow the model of those similar to those set out in sections 40.7 through 40.9 of the Saskatchewan Public Guardian and Trustee Act. These include the authority to require a financial institution to suspend the withdrawal or payment of funds from a person's account for up to 30 days and to require the financial institution to provide relevant financial information; to nevertheless authorize certain payments from a suspended account, as appropriate; to conduct any examinations of records and request any information necessary to the investigation; and also to apply for a warrant to enter and search premises for and take possession of a record.

[87] Likewise, financial institutions also should have powers and responsibilities similar to those provided in section 40.5 of Saskatchewan's Public Guardian and Trustee Act. The authority to suspend the withdrawal or payment of funds from an account for up to five days can be of great practical value as a safeguard, and that very brief time period will pose low risk or inconvenience to the donor's property or to the attorney.

[88] The financial institution should have the power to act of its own initiative, where it has reasonable grounds to believe an attorney is acting for under an enduring power of attorney for a donor without capacity and has breached a statutory duty. This flexibility can serve a donor well in protection of its assets and, again, the very brief five-day period will minimize overreach and inconvenience, particularly where the financial institution retains the discretion to allow payments to be made from the suspended account. An educative role of a financial regulator, as proposed by the Law Reform Commission of Ireland⁴², may be of value in this function.

[89] These powers should be accompanied by a duty to immediately report the suspension, along with supporting information, to the public official who is designated in the jurisdiction to receive reports. This responsibility further increases transparency and accountability and strengthens the evidentiary foundation for any further action that might be required.

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[90] As noted above, the public official should have authority to apply to the court for termination of the enduring power of attorney, or to apply for termination of the appointment of the attorney and for the appointment of a new attorney. This authority of the designated public official, as discussed, must not supplant the right of a private person to bring any similar court application for the termination of the appointment of an attorney. To avail of existing legislative starting points across Canadian provincial and territorial jurisdictions, and with reference to the Appendix, the public office with which these powers and authority should reside is the office Public Guardian and Trustee. Indeed, three jurisdictions currently confer some extent of such powers on the Public Guardian and Trustee.

[91] The Law Reform Commission of Ireland recommended a broad and strong supervisory role in respects of the enduring powers of attorney aspects of its proposed Office of the Public Guardian.⁴³ That office would receive reports and accountings and also would hold the register of enduring powers of attorney. (There such a register already was legislated, but as the responsibility of another office.) Notably, the recommended proposed office also would receive reports of suspected abuse or mismanagement by an attorney and could seek the termination of an attorney's appointment.

[92] That report also recommended a strong and proactive educative role for its proposed Office of the Public Guardian.⁴⁴ The office would educate the public and act as a central resource for information relating to the empowerment and protection of vulnerable people. It also would work to help potential donors understand the implications of an enduring power of attorney and help them to make relevant wise choices about selecting an attorney and granting powers. It is reasonable to suggest the educative role of a public office should include maintaining this responsibility in respect of attorneys as well.

[93] As was seen earlier, there is great potential value in full communication of the nature of the duties an attorney undertakes under a power of attorney and, in particular, under an enduring power of attorney for an incapacitated donor. Full understanding alone of the fiduciary duty and responsibility alone can prevent at least inadvertent misuse of the authority the instrument grants. The further full communication of the remedies available might reduce the occurrence of misuse by an attorney and can support interested individuals in the event of misuse. An educative role in communication of

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duties, responsibilities, and available remedies may well be suited to the public office designated to receive reports and engage remedial authority.

CONCLUSIONS

[94] The enduring or springing power of attorney is a valuable financial planning tool: simple, flexible, and protective of the autonomy of the donor. Legislation in Canadian jurisdictions has developed well over recent years.

[95] However, as the Appendix shows, there is significant disparity among the jurisdictions in the scope and detail of provisions that govern the enduring power of attorney. The precise content of enduring power of attorney or mandate legislative provisions is important. Without the legislation, a power of attorney would cease at the incapacity of the donor or mandator. And portability of the instrument among jurisdictions offers greater certainty and flexibility for the donor.

[96] What many of the legislative schemes have in common is some level of safeguard. Requirements in respect of the creation of the instrument are set out. In some jurisdictions, the duties of the attorney are legislated, though to an uneven degree of completeness and clarity. Responsibilities of accounting are legislated. And some jurisdictions contemplate the oversight or involvement of the Public Guardian and Trustee.

[97] Nevertheless, financial exploitation of donors exists and, though hidden, may account for a significant share of the problem of abuse of older adults. As noted at the beginning of this section, criminal legislative penalties and remedial approaches exist; however, misuse of powers of attorney may not always successfully or easily engage the criminal law.

[98] Existing safeguards can offer some predictability and consistency but, at present, they offer only passive and incomplete protection. All have the potential to go further. Uniform legislation can provide for strong, active protection within the regime of enduring powers of legislation.

[99] Clear expression of an attorney's duties and the expected standard of their performance is a simple, preventative and educative safeguard.

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[100] Legislation can require notice, upon the incapacity of a donor, that an attorney is now acting and that the attorney accepts and acknowledges the role. This reiterates the responsibility to the attorney, and it makes third and interested persons aware that the attorney is now acting without the donor's oversight.

[101] Duties to keep accounts can be clarified, extended and enhanced. Clear expression of record-keeping duties can ground duties to report on request by designated persons. This can prevent co-mingling of funds or exploitation of the donor's assets and also support remedies, should financial abuse occur.

[102] Legislation can provide for specific and limited remedial powers for a public office and financial institutions to address reasonable suspicions of financial abuse. Concrete remedial powers to suspend accounts can help to prevent exploitation.

[103] Uniform enhancement of enduring power of attorney legislation can strengthen the instrument, keeping it a valuable tool that supports autonomy in financial planning. But these recommendations show that legislative reform is needed, to prevent this very tool from itself becoming an instrument of the financial abuse it was designed to avoid.

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¹ Donald Poirier & Norma Poirier, *Why is it so difficult to combat elder abuse and, in particular, financial exploitation of the elderly?* ([Ottawa]: Law Commission of Canada, 1999).

² *Misuse of Enduring Powers of Attorney - Publication_78_170_R71.pdf*, online <http://www.lawcom.govt.nz/sites/default/files/publications/2001/03/Publication_78_170_R71.pdf>.

³ Andrew H Hook and Lisa V Johnson, “The Uniform Power of Attorney Act” (2010) *Real Property, Trust and Estate Law Journal* 283.

⁴ Civil Code of Québec, LRQ, c C-1991, s 2166 and onward.

⁵ RSNL 1990, c E-11.

⁶ Substitute Decisions Act, 1992, SO 1992, c 30 .

⁷ Property Act, RSNB 1973, c P-19 s 57; Infirm Persons Act, RSNB 1973, c I-8 s 40.

⁸ See Andrew H Hook and Lisa V Johnson, “The Uniform Power of Attorney Act” (2010) *Real Property, Trust and Estate Law Journal* 283 at 287 for a comparable experience in the United States.

⁹ RSNB 1973, c P-19, ss 56 to 58.7.

¹⁰ RSNB 1973, c I-8 s 40, 41.

¹¹ RSY 2002, c 73, s 3.

¹² Substitute Decisions Act, 1992, SO 1992, c 30, s 7(7.1), 7(8).

¹³ See, e.g., Alberta Law Reform Institute, *Enduring powers of attorney : safeguards against abuse* (Edmonton: The Institute, 2003); Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform ([Canada]: Western Canada Law Reform Agencies, 2008).*

¹⁴ RSBC 1996, c 370.

¹⁵ See *Re Taubner Estate* 2010 ABQB 60: “It makes no sense for the Court to be able to make remedial orders against personal representatives, but not against attorneys. In my view “accounting” remedies under the Powers of Attorney Act should be interpreted liberally. A liberal interpretation includes the power to make remedial orders or judgments that are appropriate having regard to the accounting that has been provided.”

¹⁶ See, e.g., New Zealand Law Commission, *Misuse of Enduring Powers of Attorney* (Wellington: Law Commission, 2001) at 16 to 17.

¹⁷ Power of Attorney Act, RSBC 1996, c 370, ss 34 to 36.

¹⁸ Powers of Attorney Act, CCSM c P97, s 12.

¹⁹ Vulnerable Persons Living with a Mental Disability Act, CCSM c V90

²⁰ See, e.g., Public Guardian and Trustee Act, RSBC 1996, c 383; Public Guardian and Trustee Act, SS 1983, c P-36.3; Public Guardian and Trustee Act, SY 2003, c 21, Sch C.

²¹ Canadian Centre for Elder Law, *Background Paper: Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts* (March 2013), pp 3-4.

²² New Zealand Law Commission. *Misuse of Enduring Powers of Attorney*. Wellington: Law Commission, 2001, pp 3-4, 8.

²³ New Zealand Law Commission. *Misuse of Enduring Powers of Attorney*. Wellington: Law Commission, 2001, p 3.

²⁴ See, for example, *Re Burling Estate*, 1993 CanLII 8433, 112 Nfld & PEIR 91 (NL SCTD) <<http://canlii.ca/t/g08cl>> (because Enduring Powers of Attorney Act is silent on remuneration and specific powers and duties, court applies Trustee Act provisions); >; *B.F.H. v D.D.H.*, 2010 NSSC 340 <<http://canlii.ca/t/2d508>> (court read its remedial and review powers expansively and without limitation, so to encompass activities of attorney outside period of incapacity; court read fiduciary relationship to require proof of intent before attorney accepts gift from donor); *Huzel v Habing (Estate of Agnes Johnson)*, 2008 MBQB 10, 223 Man R (2d) 317 <<http://canlii.ca/t/1vkml>> (infirmary clause in power of attorney rendered appointment in effect an enduring power of attorney; applicable legislation explicitly requires attorney to

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provide accounting while acting under enduring power; legislation in other jurisdiction not requiring accounting not analogous in factual context); *Re Taubner Estate*, 2010 ABQB 60 <<http://canlii.ca/t/27sp3>> (donor may not have been competent when he entered into contract (though not improvident) and solicitor unaware; on the facts, granddaughter considered “interested person” for purposes of accounting and statutory definition correctly broad; power of attorney found to create fiduciary relationship; applies extrajurisdictional case law and legal literature for expression of duties of attorney and standard of care); *E.B. v S.B. and B.K.*, 2010 MBQB 15 <<http://canlii.ca/t/27vh0>> (court evaluated evidence to find donor competent to give and revoke enduring power of attorney; neither attorney nor beneficiary addressed power of attorney requirement of proper accounting; attorney did not keep proper accounts; court analyzed extrajurisdictional case law and found fiduciary relationship not satisfied; power of attorney terminated and Public Trustee appointed as committee); *Re Sangha*, 2013 BCSC 1965 <<http://canlii.ca/t/g1npr>> (factual dispute about donor competence to grant or revoke power of attorney resolved in favour of competence; conduct of attorney and her misunderstanding of her fiduciary duties caused distress to donor and confusion to caregivers; attorney misused funds of donor and independently of co-attorneys;); *Re Ericksen Estate*, 2008 ABQB 587 (CanLII) <<http://canlii.ca/t/20vnj>> (court conducted extensive review of extrajurisdictional case law and legal literature to describe attorney’s duties, interpret powers, and determine whether power sought was permitted; court referred to law reform report recommendation that court not retain discretion to permit power sought where not granted in power of attorney); *Re M.M. (Dependent Adult)*, 2002 ABQB 739 <<http://canlii.ca/t/1q8wr>> (attorney under enduring party sought to be appointed trustee of donor diagnosed with dementia and disputed diagnosis; attorney had failed to pay donor’s residence costs and court noted Enduring Powers of Attorney Act does not establish the kind of accountability established by Dependent Adults Act); *Clapperton Estate v Davey*, 2009 ABQB 63 (CanLII) <<http://canlii.ca/t/fqj1v>> (statement of claim already filed and no evidence available to support proposed amendment that donor granted enduring power of attorney to applicant before her incapacity); *Begg v Begg*, 2013 BCSC 84 (CanLII) <<http://canlii.ca/t/fvr5t>> (evidence unclear and insufficient to enable court to determine whether donor incompetent and at the time of disputed conduct of attorney; some interested parties or immediate family members did not receive timely notice of existence of enduring power of attorney.).

²⁵ The Law Commission of New Zealand similarly noted this need: New Zealand Law Commission. *Misuse of Enduring Powers of Attorney*. Wellington: Law Commission, 2001, p 5.

²⁶ Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform ([Canada]: Western Canada Law Reform Agencies, 2008)*, para 130.

²⁷ The Law Commission of New Zealand made similar recommendations about the legislative expression of the fiduciary nature of the attorney’s role: New Zealand Law Commission. *Misuse of Enduring Powers of Attorney*. Wellington: Law Commission, 2001, pp 3-4, 8.

²⁸ *Re Taubner Estate* 2010 ABQB 60, general, and at paras 242 to 288.

²⁹ See Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform ([Canada]: Western Canada Law Reform Agencies, 2008)* at p 52.

³⁰ New Zealand Law Commission. *Misuse of Enduring Powers of Attorney*. Wellington: Law Commission, 2001, pp 9 to 12.

³¹ New Zealand Law Commission. *Misuse of Enduring Powers of Attorney*. Wellington: Law Commission, 2001, p 18.

³² Law Reform Commission of Ireland, *Report: Vulnerable Adults and the Law*. Dublin: Law Reform Commission, 2006, p 104. The report also acknowledged there may be situations where a donor would choose to exclude a specific person who otherwise would fall in the class of those to whom notice would be granted. The report recommended the donor be free to so choose while of capacity, so long as the class continues to include at least one other person than the attorney.

³³ Law Reform Commission of Ireland, *Report: Vulnerable Adults and the Law*. Dublin: Law Reform Commission, 2006, p 108 to 109.

³⁴ *Re Taubner Estate* 2010 ABQB 60.

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³⁵ See Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform ([Canada]: Western Canada Law Reform Agencies, 2008)*, p 43 and 46, for a recommendation of details of the records the attorney ought to be required to keep.

³⁶ New Zealand Law Commission. *Misuse of Enduring Powers of Attorney*. Wellington: Law Commission, 2001, p 18 to 19.

³⁷ Law Reform Commission of Ireland, *Report: Vulnerable Adults and the Law*. Dublin: Law Reform Commission, 2006, p 108.

³⁸ Public Guardian and Trustee Act, SS 1983, c P-36.3, ss. 40.5 to 40.9. See Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform ([Canada]: Western Canada Law Reform Agencies, 2008)* at pp 66 to 67.

³⁹ Public Guardian and Trustee Act, SS 1983, c P-36.3, ss. 40.5 to 40.9.

⁴⁰ See Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform ([Canada]: Western Canada Law Reform Agencies, 2008)* at 73.

⁴¹ Law Reform Commission of Ireland, *Report: Vulnerable Adults and the Law*. Dublin: Law Reform Commission, 2006, p 108. That recommendation contemplated the context of registered enduring powers of attorney. It is suggested the goal may similarly be pursued with a system of notices of attorney acting.

⁴² Law Reform Commission of Ireland, *Report: Vulnerable Adults and the Law*. Dublin: Law Reform Commission, 2006, p 108.

⁴³ Law Reform Commission of Ireland, *Report: Vulnerable Adults and the Law*. Dublin: Law Reform Commission, 2006, pp 149 to 153.

⁴⁴ Law Reform Commission of Ireland, *Report: Vulnerable Adults and the Law*. Dublin: Law Reform Commission, 2006, pp 150 to 151.