

# STEP Inside

NEWSLETTER OF THE SOCIETY OF TRUST AND ESTATE PRACTITIONERS (CANADA)



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## THE ENFORCEMENT OF FOREIGN POWERS OF ATTORNEY IN ATLANTIC CANADA – CAN YOU MAKE IT WORK?

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Estate practitioners in Atlantic Canada are often faced with the question of whether an enduring/durable power of attorney for financial and property matters (a “Power”) executed outside of one of the Atlantic Canadian provinces can work to effect banking/investment decisions or to sell/transfer real property when the donor of the Power is incompetent. This often arises where individuals have moved from another jurisdiction to an Atlantic Canadian province later in life and did not update their Power to reflect the laws of their new province of residency.

Estate planners often recommend that clients update their Powers when they move, but is that really necessary? Does the inclusion of a provision stating that the Power is effective under the law of the jurisdiction it was made in and “any other similar legislation in force in any other jurisdiction” assist? The answer might be - “it depends on where you’re moving”!

### Nova Scotia

The Nova Scotia *Powers of Attorney Act*, RSNS 1989, c 352 (the “NS Act”), does not expressly address the validity or operation of foreign (non-Nova Scotia) Powers. As such, the Law Reform Commission of Nova Scotia in its report on the NS Act in August of 2015 recommended the government make provision for foreign Powers, by including specific wording in an updated statute that would recognize Powers

similar to the recognition provided for foreign wills in the Nova Scotia Wills Act (see Nova Scotia Law Reform Commission, *The Powers of Attorney Act – Final Report* (Halifax: LRCNS, 2015) at 91 (the “NS Report”).

However, to date the Province has not made any of the amendments to the NS Act that were recommended in the NS Report. So in the absence of legislation, what do we do?

In a recent decision from the Supreme Court of Nova Scotia stemming from a contractual dispute, Scaravelli J. stated that as the law currently stands, the Court must assess foreign Powers on a case-by-case basis (see *Jefferson v Pillar to Post-Central Home Inspections*, 2016 NSSC 309 at para 29 (“*Jefferson*”). The Court

provision: *This power of attorney shall be governed by Missouri law, although I request that it be honored in any state or other location in which I or my property may be found...* (at para 31).

While this case may be of assistance where needed, given the lack of statutory authorization for the recognition of a foreign Power in NS, prudent planners are still wise to recommend new NS-compliant Powers be entered into when possible.

### New Brunswick

New Brunswick recently modernized its incapacity legislation with the new *Enduring Powers of Attorney Act*, SNB 2019, c 30 (the “NB Act”), that came into force on July 1, 2020, and which replaced a patchwork of

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placed great weight on the fact that the Power in question met the formal requirements for Nova Scotia, even though it was drafted and executed in the United States. Further, even if the Power had not been valid on its face, the facts in *Jefferson* were such that the document would have imbued the attorney with the apparent authority needed to bind the donor (at para 32). Interestingly, the Missouri Power in question contained the following

prior legislation. In addition to various other helpful changes to confirm the authority of the named attorney, to allow for the appointment of a monitor, and clarifying an attorney’s record keeping obligations, the NB Act has clear provisions on the recognition of foreign powers. In particular, it deems valid an enduring power of attorney made outside New Brunswick if:

- i. the document confers on another person the authority to act in

- relation to property and financial affairs;
- ii. the person given authority is able to act when the other person lacks capacity; and
- iii. the document is valid in the place where it was made.

These provisions provide a clear basis for financial instructions and parties to conveyancing transactions to rely on a foreign Power that meets those defined criteria.

### **Newfoundland and Labrador**

The Newfoundland and Labrador *Enduring Powers of Attorney Act*, RSNL 1990, c E-11 (the “NL Act”), is also silent regarding the operation of foreign Powers and there are no known legislative changes on the horizon to amend the legislation.

There also does not appear to be any reported case law in Newfoundland and Labrador dealing specifically with this issue. This leads to the conclusion that like Nova Scotia, the courts in Newfoundland and Labrador would take a case-by-case approach to determining the validity of a foreign Power.

As with Nova Scotia, prudent planners are still wise to recommend new NL-compliant Powers be entered into when possible

### **Prince Edward Island**

Finally, the Prince Edward Island Powers of Attorney Act, RSPEI 1988, P-16 (the “PEI Act”), also does not address foreign Powers and there are no known plans to amend the legislation. Further, there is no reported case law from Prince Edward Island addressing the issue. As with Newfoundland and Labrador, it is likely that the Jefferson case from Nova Scotia would be highly persuasive and the PEI Courts would evaluate foreign Powers on a case-by-case basis. However, prudent planners should still recommend execution of new PEI-compliant Powers.

### **CONCLUSIONS**

1. In Nova Scotia, foreign Powers are evaluated on a case-by-case basis and may operate even if they do not conform with the provincial requirements if they confer perceived authority. A statement of effectiveness in other jurisdictions

in the Power might assist enforceability in Nova Scotia.

2. In New Brunswick, the new legislative changes noted above make the use of foreign Powers clearly acceptable when they meet defined criteria.
3. In Newfoundland and Labrador, the law on foreign Powers is undefined. It is likely that the Court would follow the precedent set by Nova Scotia and evaluate Powers on a case-by-case basis.
4. In Prince Edward Island, the law on foreign Powers is undefined. It is likely that the Court would follow the precedent set by Nova Scotia and evaluate Powers on a case-by-case basis.

As you can see, the law on the effectiveness on foreign Powers varies among the four Atlantic Canadian provinces. The prudent planner in Nova Scotia, Newfoundland and Labrador and Prince Edward Island will account for this with strong recommendations for updates when presented with these documents by their clients!