ENDURING POWERS OF ATTORNEY ACT AND COMMERCIAL TRANSACTIONS INVOLVING INDIVIDUALS

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On July 1, 2020, the *Enduring Powers of Attorney Act* (the Act) came into force in New Brunswick, establishing the province's first comprehensive regime involving powers of attorney. The Act marks a wholesale change in the way in which powers of attorney for individuals are prepared and used in New Brunswick, while declaring that enduring powers of attorney made before its coming into force remain valid and subject to its provisions. This article explores ways in which the Act has the potential to adversely affect special purpose powers of attorney ordinarily granted in commercial documents and transactions (commercial powers of attorney).

Commercial powers of attorney ordinarily include powers of attorney

that form part of general security agreements, mortgages, shareholders' agreements, share subscription agreements, and documents used to facilitate the closing of share sales (including stock powers of attorney). Although the Act read in whole gives the impression that it is intended to apply to typical personal powers of attorney, the wording of many of its provisions is broad enough to include commercial powers of attorney as well. One can conclude that the Act does not apply to powers of attorney granted by corporations because it refers to enduring powers of attorney and in many provisions to mental capacity, matters that are inapplicable to corporations. The potential concerns with respect to the Act's impact on commercial powers of attorney are limited to powers granted by individuals. Below is a summary of the issues that could arise in drafting and using commercial powers of attorney given by individuals under the Act.

The Act requires an attorney to seek the consent of a grantor who is still mentally competent before taking any action under the power of attorney. In many commercial contexts, this requirement will render the power of attorney useless to those relying it, unless the drafting confers or clearly implies an ongoing consent that the attorney exercise his or her powers; this is an exception permitted under the Act. However, even careful drafting of a consent clause cannot cover every conceivable future use of the power.

Attorneys are also prohibited under the Act from using the property of the grantor for a purpose that does not benefit the grantor. Although on its face this restriction has the potential to obviate the use of a special purpose power of attorney in commercial contexts, the Act allows the restriction to be waived by means of specific provisions included in the power of attorney. The risk may therefore be avoided through careful drafting. In principle, it may also be argued that fulfilling the purpose of the power of attorney in fact benefits the grantor.

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Furthermore, the Act prohibits anyone from compelling a person to have a power of attorney as a condition of receiving a good or service. This presents a potential problem in the commercial context, and again clear drafting in relation to the intentions of the parties is likely the best means of addressing the prohibition, at least in the absence of judicial interpretation.

Finally, the Act requires that a new power of attorney be signed in front of a lawyer, who must complete a certificate in prescribed form. The power of attorney may not be valid or enforceable if this procedure is not followed, and the Act does not have a substantial compliance provision. However, this execution requirement applies only to documents signed on or after July 1, 2020, and therefore creates no retroactivity concerns.

Presently, the best response is probably clear and careful drafting in accordance with the provisions of the Act; however, such a response is impossible in the case of documents drafted by parties unfamiliar with the statutory requirements or drafted before these issues were identified. When dealing with commercial powers of attorney that do not address these issues, practitioners might consider whether the provision relating to irrevocable powers of attorney in New Brunswick's *Property Act* applies to their situation. However, certain provisions of the *Property Act* and the *Enduring Powers of Attorney Act* are in direct conflict, and no judicial or legislative clarification has been provided to date.

Because the Act is relatively new, not based on pre-existing legislation, and still lacking in judicial interpretation, practitioners in New Brunswick are in the process of exploring the boundaries of the new regime: considering whether it in fact applies to commercial powers of attorney given by individuals and what its effect may be on the irrevocable powers of attorney granted under the *Property Act*. It is hard to believe that the Act's drafters intended this to be the case, given the potential for disruption of commercial transactions and the retroactive effect of certain provisions as outlined above; however, a cautious approach is warranted as a result of the uncertainty surrounding the Act's application.

Until a court declares otherwise or a legislative amendment clarifies the question, a conservative approach suggests that the Act should be viewed as applying to powers of attorney granted by individuals in commercial documents and transactions in New Brunswick, and practitioners should proceed with caution.