MANITOBA

LAW REFORM COMMISSION
COMMISSION DE RÉFORME DU DROIT

REPORT

ON

SPECIAL, ENDURING POWERS OF ATTORNEY

Report #14

January 8, 1974

The Manitoba Law Reform Commission was established by "*The Law Reform Commission Act*" in 1970 and began functioning in 1971.

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SPECIAL, ENDURING POWERS OF ATTORNEY

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The subject of this Report is the creation of powers of attorney and, in particular, the effect of a donor's subsequent incapacity or death on the validity of the power.

It is our opinion that the law on this matter is in an unsatisfactory state.

BACKGROUND

The most unsatisfactory present aspect of the law is that even though a power of attorney may be validly created, the supervening insanity or other mental incapacity of a serious nature of the donor terminates the authority of the agent. In these times of highly advanced and accessible medical and health care, more and more people are outliving their full mental capacities. Of course, mental incapacity can afflict people of all ages. In one of the few Canadian decisions on this matter — that of Bridges, J. in *Re Parks, Canada Permanent Trust Company v. Parks* (1957) 8 D.L.R. (2d) 155 — there was adopted as a correct statement of the law a passage to be found in 1 Halsbury, 3rd edition, page 244:

> If the principal becomes a person of unsound mind, the agency as between the principal and agent is terminated, but is not *ipso facto* revoked with regard to a third person dealing with the agent without knowledge of the condition of the principal.

The judgment of Bridges, J. and the statement in Halsbury appear to be in conflict with a statement to be found in the Canadian Encyclopedic Digest, both Ontario and western editions. It is therein stated that "insanity of the principal does not *ipso facto* revoke the agency".[1] The only authorities cited for the view of the Canadian Encyclopedic Digest is an Ontario case of 1921 — *Kerr v. Town of Petrolia* (1921) 51 O.L.R. 74. In arriving at his decision in that case Mulock, C.J. Ex., rejected a considerable body of judicial and textbook authority. It is, perhaps, significant that the Ontario Law Reform Commission in its report on Powers of Attorney[2] expresses doubt about relying on the *Kerr* case as an authority for the proposition voiced in the Canadian Encyclopedic Digest.

We beg to differ with the statement contained in the Canadian Encyclopedic Digest and find more acceptable the decision of Bridges, J. in *Re Parks, Canada Permanent Trust Company v. Parks.*[3] That decision was rendered in circumstances involving directly the validity of a power of attorney consequent upon the incapacity of the principal, and Bridges, J. thoroughly reviewed the rather meager existing case authority bearing upon the matter.[4]

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1 C.E.D. (Ont. 2d), p. 148, 206. 1 C.E.D. (Western 2d), p. 289.

2 (1972), p. 13.

3 (1957) 8 D.L.R. (2d) 155.

4 *Drew v. Nunn* (1879) 4 Q.B.D. 661, *Yonge v. Toynbee* (1910) 1 K.B. 215 and *Watson v. Powell* (1921) 2 W.W.R. 128.

In *Drew v. Nunn*[5] it was stated by Brett, L.J. that ". . . I think that the satisfactory principle to be adopted is that, where such a change occurs as to the principal that he can no longer act for himself, the agent whom he has appointed can no longer act for him. In the present case a great change had occurred in the condition of the principal: He was so far afflicted with insanity as to be disabled from acting for himself; therefore his wife, who was his agent, could no longer act for him. Upon the ground which I have pointed out, I think that her authority was terminated. It seems to me that an agent is liable to be sued by a third person, if he assumes to act on his principal's behalf after he had knowledge of his principal's incompetency to act. In a case of that kind he is acting wrongfully. . .". (The court went on to hold in that case that the principal did remain liable for what the agent had done so long as the third party had no notice of the principal's insanity.) In *Yonge v. Toynbee*[6] the English Court of Appeal held that the subsequent insanity of the principal annulled any authority which may have been created in due form while the principal was sane, whether or not the agent is aware of the principal's supervening insanity, with the result that if the agent acts on the power, he acts without authority and therefore may be held liable on the ground that he has impliedly warranted an authority which he did not possess.

The position of an agent acting under a power of attorney which may have been annulled in this way is, in Manitoba, somewhat ameliorated (although not completely safeguarded) by the provisions of s. 35(1) of "*The Law of Property Act*" (C.C.S.M. L90). This reads:

> "Payments to *(sic:* query should the text read "by") agent valid if made bona fide
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> 35(1) Any person making or doing any payment or act in good faith, in pursuance of a power of attorney, is not liable in respect of the payment or act by reason that, before the payment or act, the donor of the power had died or become lunatic, of unsound mind or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy or revocation was not at the time of the payment or act known to the person making or doing it."

Although helpful to the agent, this provision is not a complete answer to his dilemma, and is in no sense a substitute for our main recommendation expressed below (i.e. that it be possible to create a power of attorney capable of surviving supervening incapacity of the donor of the power). We would, however, be happy to see s. 35(1) retained; it, in our view, offers justice in situations which would still occur even if our recommendations in this report were implemented.

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5 *Ibid.*

6 *Ibid.*

We would concur with the view expressed by the Ontario Law Reform Commission on this matter at page fourteen of their Report referred to above (footnote 2):

> It is apparent that the law is in an unsatisfactory state. In the late 19th and early 20th Century when the rule was formulated that the subsequent insanity of the donor revoked the agent's authority, there was a clear cut test of insanity, and that was evidenced by the person being certified. Today, the question of whether or not a person is *compos mentis* is a much more difficult one to answer. As a result, considerable practical difficulties are created for attorneys. These can and should be eliminated.

THE PROBLEMS

We have identified four major problems which, we think it is fair to posit, arise from the present unsatisfactory state of the law. These are:

1. As pointed out above, the modern definition of insanity, or at least mental incapacity of such a degree as to cause the power of attorney automatically to be revoked, is not a simple matter. Today, it does not depend upon simple straightforward certification of the individual and thus a considerable degree of uncertainty exists in the basic application of this rule to any given factual situation.
2. This difficulty is exacerbated by the "stigma" attaching to any certification of the incapacitated person, and usually his family and close associates are extremely reluctant to take this step. Thus the "grey" period during which the situation is not at all clear is usually perpetuated, with potential prejudice to the position of the donee of any power of attorney, and also to the actual conduct of the person who gave the power in the first place.
3. It does seem illogical, and at the very least cannot increase respect for the law, that at the very moment when a person most needs another trusted individual to act on his behalf, his attorney, because the donor is incapable of managing his affairs, should be placed in a position of not being able to do so since his power has been revoked by law.
4. The position of an attorney who does continue to act under the power of attorney has already been illustrated by the cases referred to above. The net result of the present state of the law is that at best the position of the attorney is made a most uneasy one as the donor of the power becomes increasingly senile and less capable, and at worst may degenerate into a most invidious position under which, although attempting to act *bona fide* the attorney may,

subject to the provisions of s. 35(1) of "*The Law of Property Act*" referred to above, find himself personally liable to third parties for his action performed in an attempt to serve the welfare of the donor of his power.

We have noted that the work of the English Law Reform Commission in this field including its report on powers of attorney[7] and we have considered the English Power of Attorney Act (1971) which was subsequently enacted.

We note that as a result of the English Law Commission report the position of the attorney in that jurisdiction has been somewhat ameliorated by the recommendation, enacted as section 5 of the English Act, to the effect that an attorney acting in good faith subsequent to the lapsing into incapacity of the donor would not be liable either to the donor or a third party if at the relevant time he did not know that the donor had revoked the power, or that an event had occurred which caused it to be revoked. This is similar in effect to the provisions of s. 35(1) of "*The Law of Property Act*" referred to above. The English Law Commission, however, made no recommendations on what is really the fundamental point in the whole issue, and that is the one made under point three above, namely that of the overall effect of the donor's subsequent incapacity on the donee's basic authority to act.

Submissions had been made to the English Law Commission by a number of law societies within that jurisdiction echoing the view of the Ontario Law Reform Commission that the law is unsatisfactory in this regard. The English Law Commission did recognize that "it would undoubtedly be convenient if it were possible to grant a power under which the attorney would be entitled to continue to handle the donor's affairs notwithstanding the latter's incapacity".[8] That Commission, however, went on to voice the opinion that "provision for such a facility might be thought to impinge too much on the safeguards provided by the Court of Protection". This appears to be the main reason why the English Law Commission did not perceive it to be wise to recommend on this particular point.

We wish to note that the same reasoning may not apply in this jurisdiction, if for no other reason than that we do not have here a Court of Protection working in the plenitude and fullness of jurisdiction as the one operative in England. We are, of course, keenly aware of the recent creation of the new office of Public Trustee under "*The Public Trustee Act*" (C.C.S.M. P270) and, as indicated below, we have at each stage in the formulating of recommendations contained in this paper, consulted with the first holder of that office. Yet we feel that there are substantial differences

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7 **Law Commission #30, Command 4473.**

8 *Ibid.*, p. 12.

between the position of the Public Trustee in Manitoba and the Court of Protection in the English jurisdiction and for that reason feel that we are justified in making recommendations which the English Law Commission declined to make for the purposes of that jurisdiction.

PRIMARY RECOMMENDATIONS

We recommend that there be enacted legislation making it possible for a donor of a power of attorney to provide expressly for the power to survive his subsequent incapacity subject to certain conditions. In formulating these conditions, we recommend that there be taken as a general working model, the draft Powers of Attorney bill proposed by the Ontario Law Reform Commission in Part VI of its report referred to above. (This draft bill has been introduced substantially in the same form as Bill 1 of the Third Session of the Twenty-Ninth Legislature of Ontario, the bill being introduced on March 20th, 1973 by the Attorney-General of that province, the Hon. D.A. Bales.) It has not been enacted. The draft bill set out at pages 35 to 39 of the report of the Ontario Law Reform Commission is set out as Appendix "A" of this report. In suggesting that this example be taken as a working model, we wish nevertheless to emphasize that because of slight differences in the law relating, for example, to the position of the Public Trustee in Manitoba and Ontario, our summarized recommendations set out below will necessitate some changes in detail from the text of the working model. The model is drawn to your attention for the reason that the general thrust and intent of that legislation is so close to that which we are recommending for this jurisdiction. Our detailed recommendations follow below.

It will be noted, from our recommendations, that we are not suggesting that there be legislated a right to provide for the possible creation of a type of power of attorney not revocable by the death of the donor.

We note that in many situations under Canadian law, a power of attorney may survive the death of the donor. For example, section 1 of "*The Powers of Attorney Act*" (1970) of Ontario allows a donor of a power of attorney to provide expressly that the power will not be revoked by his death.

In Manitoba, a number of sections of provincial Acts provide for the survival, in certain circumstances, of a power of attorney given by a donor who has now died. Examples may be found in section 61(3) of "*The Companies Act*" (C.C.S.M. C160); sections 33(1), 34 and 35(1) of "*The Law of Property Act*" (C.C.S.M. L90); and section 80(2) of "*The Real Property Act*" (C.C.S.M. R30).[9]

Provisions attempting generally to preserve powers of attorney after the death of the donor have drawn expressions of disfavour from both the Ontario Law Reform Commission, and the English Law Commission. The

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[9] For full texts of these sections, see Appendix "B".

Ontario Commission, commenting on section 1 of its own Power of Attorney Act stated that "serious doubts have been expressed about the necessity and desirability of allowing the power to survive the death of the donor".[10] The Ontario Commission went on to note that they saw no practical necessity for a power of attorney continuing to be valid following the donor's death. They pointed out that where an executor is named he will have the necessary authority to act on the testator's behalf. Even if the donor dies intestate there is no immediate urgency, as the donor's family will not be left without funds; a bank may now pay out up to $2,500 without any succession duty consent and insurance companies can make immediate payment under a policy of up to $11,500 to a spouse or $2,500 to any other person. The Ontario Commission recommended that a donor of a power of attorney should not be able to provide expressly for the survival of the power subsequent to his death.

We note that this view corresponds substantially with those expressed in submissions made to the English Law Commission. We note further, that this position corresponds with what appears to be the common law position existing in the Province of Manitoba and as stated in the judgment of Dennistoun, J.A. in *McIntyre v. Royal Trust Company* (1946) 1 W.W.R. 210. In that case it was held that on the death of a principal, instructions given to his agent came to an end and that therefore the agent was unable to complete an imperfect gift by delivery.

We would further note that in our discussions with the Public Trustee of Manitoba, he helpfully expressed the view that there was no reason to create powers of attorney which would survive the death of the donor and that this could lead to difficulties in the nature of conflicting regimes of administration of the estate of the deceased. Subject to the continuance of those sections of *"The Companies Act"*, *"The Law of Property Act"* and *"The Real Property Act"* referred to above, we have, therefore, deliberately abstained from recommending legislation on this point.

Our specific recommendations on this matter are as follows:

I. CREATION OF SPECIAL POWER OF ATTORNEY

There ought to be enacted a new statute dealing with Powers of Attorney or "The Law of Property Act" should be appropriately amended. These new amendments should contain those provisions presently set in sections 33 to 36 of "The Law of Property Act" which deal with Powers of Attorney. In addition, the amendments should contain provisions permitting the creation of a special Power of Attorney which would survive the subsequent mental incapacity of the donor.

On page 7 of this Report we have set forth the problems which exist with the present unsatisfactory situation. We are of the opinion that the creation of this special Power of Attorney would eliminate most of these problems.

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10 *Op. cit.*, p. 28.

II. FORM

a) The form of this special Power of Attorney should specifically state in clear, unambiguous language, that the donor intends that the power shall survive any mental incapacity which arises subsequent to the giving of the power of attorney and that he intends that such supervening mental incapacity shall not invalidate that power.

We recognize that it is important for a donor, who is giving another party complete (or limited) power to administer his entire estate, to know the full ramifications of that action. We can, for example, envisage a situation where a donor may have faith in an attorney to administer the estate while the donor still has the mental capacity to revoke the Power of Attorney. That donor, however, may not have sufficient faith in his attorney to administer the estate when his capacity to revoke has disappeared by virtue of supervening incapacity. The donor may, in that situation, prefer to have his estate administered by the Public Trustee.

(b) The special Power of Attorney should specifically provide that every attorney, if so directed by the donor, should be required to file his accounts annually with the Public Trustee and should set out the penalties for non-filing (see sections IV and V of this Report).

(c) The special Power of Attorney should contain a form of acceptance by the donee of the power, indicating that he is accepting the power and is aware of the conditions relating to filing (section IV) and to accounting (section V) and is aware of the fact that the power will survive any subsequent mental incapacity of the donor.

(d) The form of the special Power of Attorney should contain a provision in which the donor of the power specifies whether or not the administration of his estate shall be fee-bearing. The acceptance on the form to be executed by the attorney should contain an acknowledgement by the attorney that the administration of the estate is or is not fee-bearing. Provision should also be made to permit the attorney to apply to the Surrogate Court to have the status of the administration changed from non fee-bearing to fee-bearing where the situation warrants this change.

III. EXECUTION

The special Power of Attorney should be executed by the donor in the presence of at least two witnesses (i) neither of whom must be the donee or the spouse of the donee and (ii) one of whom must be a physician, surgeon, barrister or solicitor, and (iii) not more than one of whom is a member of the donor's family. A supporting affidavit of execution confirming that these three requirements have been set should also be made for a form of Declaration in which the witnesses testify that (a) they know the donor personally and (b) they have reason to believe the donor and the person executing the Power of Attorney are one and the same person, and (c) that the donor appears to be of sound mind and that he appeared to understand what was being executed.

This procedure for execution, similar to that used in wills and passports, we think, would be more likely to ensure that the donor is fully aware of the intent of the special Power of Attorney and the full ramifications of the act of giving the power to the attorney.

IV. FILING

(a) The attorney should be required to file true copies of the special Power of Attorney in the office of the Registrar of the Surrogate Courts of the Province of Manitoba and in the office of the Public Trustee of Manitoba.

We recommend the filing in the office of the Registrar of the Surrogate Courts for Manitoba as this is the office which is the central registry for all wills filed in Manitoba Surrogate Courts.

(b) This filing should be done within 15 days after the date on which the donee of the special Power of Attorney has signed the acceptance, and it may be done by the donor or donee or any person on behalf of either of them.

(c) Subject to subsection (d) a special Power of Attorney, which is not filed in accordance with subsection (b) shall not come into force and shall be of no effect.

(d) Provision should be made to permit an attorney to apply to the Surrogate Court for an extension of time in which to complete the filing. Where such an extension is given and the filing is completed, the exercise of the power subsequent to the mental incapacity of the donor would be validated.

V. ACCOUNTS

(a) Every attorney who has been given a special Power of Attorney pursuant to this Act, and whose power has been filed in accordance with section IV above, should be required to file his accounts annually with the Public Trustee, as directed, and within 1 month of learning of the donor's death.

(b) The Public Trustee may require a special attorney, not so directed by the donor, to file accounts if an interested party complains.

(c) The Act should provide that the fees be such as the Public Trustee, in his discretion considers reasonable. The donee should have the right to appeal to the Surrogate Court.

(d) The Public Trustee should be empowered to investigate the accounts filed by these special attorneys, and to take what action he deems necessary to protect the estate of the donor. This action could include, for example, making an application to the Court of Queen's Bench for the removal of the Trustee and the appointment of a substitute attorney as more particularly set forth in section VI(b) below.

(e) The Act should require strict compliance with this section and should provide penalties for those attorneys who do not comply with the section.

Our discussions with the Public Trustee have prompted this recommendation. He felt that in the present, uncontrolled situation, there were too many instances where an attorney was taking advantage of the unknowing donor to charge exorbitant fees.

The Ontario Law Reform Commission recommendations do not *require* an attorney to file his accounts. They merely make provision to enable the Court to compel an attorney to pass his accounts where any interested party applies to the Court.

We are of the opinion that attorneys directed by the donor so to do should be required to file their accounts annually with the Public Trustee. This would give him a degree of supervision over these special Powers of Attorney and would put the Public Trustee in a position to assess whether or not the mentally incompetent donor's estate was being administered competently.

VI. CESSATION OF POWER

The special Power of Attorney should cease:

(a) if the donor, while mentally capable, revokes it in writing to the donee and Public Trustee and the donee's powers cease upon his receipt of the revocation;

(b) if the donor is declared mentally incompetent under the provisions of "The Mental Health Act" and a committee is appointed; where an application has been made to the Court of Queen's Bench to have a committee appointed for the estate of a person who is declared mentally incompetent, notice of the application should be required to be served upon the attorney;

(c) upon the death of the donor, subject to the provisions contained in s. 61(3) of "The Companies Act" (C.C.S.M. C160); s. 33(1), 34, 35(1) and 35(2) of "The Law of Property Act" (C.C.S.M. L90); and s. 80(2) of "The Real Property Act" (C.C.S.M. R30);

(d) if the Court of Queen's Bench orders the attorney to be relieved of his duties as set forth in sections VII and VIII below.

VII. REMOVAL OF ATTORNEY

(a) Provision should be made to permit a donee of a filed special Power to be relieved of his duties and responsibilities as attorney by written notice to the Public Trustee and the donor.

(b) The Act should contain a provision which would, in cases where a donor is incapacitated, permit any interested party or the Public Trustee to apply to the Court of Queen's Bench for an order either appointing a new attorney or appointing the Public Trustee to administer the estate of the donor where:

(i) the original attorney dies or himself becomes incapacitated; or

(ii) any member of the donor's family or other interested party or the Public Trustee is of the opinion that the original attorney is not performing his duties and accepting his responsibilities in a competent manner.

(c) Where an application is made under sections (a) or (b), notice of the filing of the application should be required to be served on any interested party and on the attorney and/or the Public Trustee, giving fifteen days in which to make any representations.

Who is an interested party? Either a member of the donor's family or a person who provides board and lodging to the donor. In some circumstances a creditor of the donor would so qualify. The donor's family should be regarded as including not only parents and children, but also siblings, nieces and nephews, in the Court's discretion.

VIII. NO WAIVER

The Act should contain a provision expressly stating that where a donor intends the power to survive any subsequent incapacity, he cannot contract out of or waive the provisions of the Act.

This recommendation is intended as a safeguard against the donor's being persuaded to waive the provisions about filing, accounting and fees to the attorney.

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The forms to be utilized are suggested in Appendix "C" to this Report.

GENERAL OBSERVATIONS

Having made the previous recommendations the Commission is quite cognizant that the simple concept of permitting the power to endure notwithstanding the donor's mental incapacity, has apparently been clothed in complexities. The Commission does not relish the involved procedures which would attend the statutory expression of our recommendations. Thus, the suggested provisions regarding filing, submission of accounts, fees, non-waiver, and removal of the attorney are included only for the purpose of protecting the mentally incapacitated donor's interest in his estate. Jurisdiction regarding the ordinary operation of the system is suggested to be conferred on the Surrogate Court. Jurisdiction over the fundamental factor of whether the named attorney is to continue in his role, or to cease his involvement through removal or resignation and substitution should be conferred on the Court of Queen's Bench to complement its existing powers regarding the appointment of committees under *"The Mental Health Act"*.

SUPPLEMENTAL RECOMMENDATION

Some representations have been made to the Commission suggesting that while the basic reform concept is good and much needed in this era of increasing longevity, yet some potential donors of the special power might flinch at making use of it because of reluctance to contemplate the deterioration of their own capacities. It would seem to be like cod liver oil: helpful but distasteful.

We perceive that the special power of attorney which we recommend would be of great use and great comfort to many prospective donors and their families. And yet, we can foresee that because of its nature and formalities it might be less employed than a calm, informed and rational approach to the matter would anticipate. It clearly makes no sense to erect a system which significant numbers of people may decline to use. There ought to be an effective, legitimate way around the anticipated difficulty — an alternative means of achieving the same goal.

The status of the proposed special attorney is somewhat analogous to that of an executor. The status of a committee under *"The Mental Health Act"* is somewhat analogous to that of an administrator. Is there then a possible middle status, somewhat analogous to that which is conferred by Letters of Administration with Will Annexed? We think so. Therefore, again without indulging in actual statutory drafting, we recommend a further provision to the following effect.

IX. CONFERRING OF SPECIAL STATUS BY COURT

Any person designated as attorney by a donor in a power of attorney, which is not a special power of attorney, may apply to the Surrogate Court to be confirmed as a special attorney, upon notice to the donor and to such members of the donor's family or the Public Trustee as a Surrogate Court Judge may direct. Upon hearing the application and any consents or objections to it, the Court may make an order which the judge in his discretion thinks right and just dealing with some or all of the following matters:

(i) (a) allowing the application and constituting the applicant as the donor's special attorney subject to all of the rights, powers, immunities, liabilities and obligations of a special attorney, as if the donor had originally executed a special power of attorney pursuant to the provisions made in that regard; or

(b) dismissing the application, if the judge finds that it would not be in the donor's interests to allow it;

(ii) the requiring of a bond in an amount to be fixed by the judge by or on behalf of the applicant; or not requiring a bond;

(iii) the allowance and fixing of the attorney's fees; or not;

(iv) the allowance, or not, of costs of the application out of the donor's estate;

(v) any extraordinary conditions which the judge considers it right and just to impose, in the circumstances of the case.

If the Court makes an order pursuant to clause (i)(a), then the attorney shall from that time become and be the donor's special attorney in law and in fact.

Of course, if the mentally incapacitated person had no designated attorney at all, then the other course of applying to the Queen's Bench to declare the person mentally disordered and to appoint a committee, might have to be followed.

It might well be that the course of raising the status of an 'ordinary' attorney, if there be one, would be pursued as often as the giving of a special power in the first place. If such were so, it would at least allow the Court to install as special attorney someone whom the mentally incapacitated donor chose, himself, in previous more lucid days. It would involve the application to the Court because, although chosen as attorney, the applicant would not have been specifically chosen as special attorney with enduring powers and therefore should not automatically wield them without persuading a judge that the applicant is, after all, the right person to do so. But if this were of some avail to people who could carry on for the mentally incapacitated donor, then it would be a valid alternative reform. The original proposal about special powers expressed earlier in this Report would remain of use to those who would not flinch at employing it, and that system would serve as the norm or charter of powers and obligations for those 'ordinary' attorneys whose status could be raised or converted, on application, to that of special attorney.

SUMMATION

The Commission therefore recommends the enactment of provisions to create and regulate the special power of attorney which are expressed in this Report, and also the provisions by which an ordinary power of attorney could, on application to the Court, be converted into a special power of attorney. The provisions should preferably be the subject of a new statute but could be enacted in a consolidated new part of "*The Law of Property Act*".

We gratefully acknowledge the thoughtful comments which we received on this subject from: Mr. Justice A.C. Hamilton of the Manitoba Court of Queen's Bench; Mr. Arthur A. Close, Legal Research Officer of the Law Reform Commission of British Columbia; Mrs. Yhetta M. Gold, Executive Director of the Age & Opportunity Centre, Inc., Winnipeg: and Mr. Alan A. Adams, a practising barrister and solicitor of Winnipeg. Our research staff members, Prof. John M. Sharp and Mrs. Patricia G. Ritchie assisted the Commission in the preparation of research materials for this Report. The availability of our Working Paper on this subject was made known in "Headnotes & Footnotes" published by the Manitoba Bar Association and copies were also furnished to various other persons and organizations whom the Commission regarded as interested in the subject. No objections were received as to the concept.

This is a Report made pursuant to Section 5(2) of *"The Law Reform Commission Act"*, dated this 8th day of January 1974.

Francis C. Muldoon, Chairman

R. Dale Gibson, Commissioner

C. Myrna Bowman, Commissioner

Robert G. Smethurst, Commissioner

Val Werier, Commissioner

Sybil Shack, Commissioner

Kenneth R. Hanly, Commissioner

APPENDIX "A"

PART VI

DRAFT POWERS OF ATTORNEY BILL

BILL **1972**

The Powers of Attorney Act, 1972

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. In this Act, Interpretation

(*a*) "attorney" means the donee of a power of attorney or where a power of attorney is given to two or more persons, whether jointly or severally or both, means any one or more of such persons;

(*b*) "legal incapacity" means mental infirmity of such a nature so as to render a person incapable of managing his affairs.

PART I

2. Notwithstanding any agreement or waiver to the contrary, this Act applies to a power of attorney that contains a provision referred to in section 3. Application of Act

3. Where a power of attorney expressly states that it may be exercised during any subsequent legal incapacity of the donor, such provision is valid and effectual, subject to such conditions and restrictions, if any, as are contained therein and not inconsistent with this Act. Powers of attorney exercisable while donor without capacity

4. A power of attorney referred to in section 3 may be revoked by the donor at any time while he has legal capacity. Revocable

5. A power of attorney that contains a provision referred to in section 3 shall be executed in the presence of a witness who is not the attorney or the attorney's spouse. Execution

6.—(1) Where the donor of a power of attorney that contains a provision referred to in section 3 subsequently is without legal capacity, the attorney may at any time, and shall, not later than fifteen days after he first learns of the incapacity, file a notarial copy of the power of attorney in the office of the registrar of the surrogate court of the county or district in which the donor or donee resides. Filing of power of attorney

Notice to Registrar of the Supreme Court of filing

(2) Notice of every filing of a power of attorney shall be transmitted by the registrar of the surrogate court by registered mail to the Registrar of the Supreme Court forthwith after the filing.

Effect of failure to file

(3) Subject to subsections 4 and 5, a power of attorney that is not filed in accordance with subsection 1 ceases to be valid and has no effect.

Extension of time for filing

(4) The attorney may apply to a judge of the surrogate court of the county or district in which the power of attorney is required to be filed for an order extending the time for filing the power of attorney and the judge, upon being satisfied that the uses, if any, made of the power by the attorney during the legal incapacity of the donor have been proper, may extend the time for filing the power of attorney to a date not more than fifteen days after the date of the order and the order or a certified copy thereof shall be filed with the power of attorney.

Exception to invalidity

(5) Where a power of attorney has become invalid under this section and a person, without knowing or having reasonable grounds for believing that the donor is without legal capacity, deals with the attorney, the transaction between them shall, in favour of that person, be as valid as if the power had then been in existence.

Passing accounts

7.—(1) Where a power of attorney contains a provision referred to in section 3 and the donor subsequently is without legal capacity, any person having a material interest, directly or indirectly, in the estate of the donor may, during such incapacity, apply to the surrogate court in the office of which the power of attorney is filed for an order requiring the attorney to pass his accounts for transactions involving an exercise of the power during the incapacity of the donor, and the court may order the attorney to pass such accounts or such part thereof as is provided in the order.

Procedure and effect

(2) Where an order is made under subsection 1, the attorney shall file his accounts in the office of the surrogate court and the proceedings and practice upon the passing of the accounts shall be the same and of the like effect as the passing of executors' or administrators' accounts in the surrogate court.

Application by Public Trustee

(3) The Public Trustee may apply under subsection 1 in the same manner as a person materially interested in the estate of the donor where it appears to him desirable to do so in the best interests of the donor or his estate.

8.—(1) Where a power of attorney contains a provision referred to in section 3 and the donor subsequently is without legal capacity, any person having a material interest, directly or indirectly, in the estate of the donor, may during such incapacity, apply to the surrogate court in the office of which a notarial copy of the power of attorney is or ought to be filed for an order substituting another person for the attorney named in the power of attorney and the court may make the order or such other order as the court considers proper. Substitution of attorney

(2) The substitution of another person for an attorney under subsection 1 shall have the like effect as the substitution of another person for a trustee under *The Trustee Act*. Effect of substitution R.S.O. 1970, c. 470

(3) The Public Trustee may apply under subsection 1 in the same manner as a person materially interested in the estate of the donor where it appears to him desirable to do so in the best interests of the donor or his estate. Application by Public Trustee

(4) The attorney may apply under subsection 1 in the same manner as a person materially interested in the estate of the donor, on giving notice to the Public Trustee and to all persons having a material interest. Application by attorney

9. A power of attorney that contains a provision referred to in section 3 becomes invalid and of no effect, notwithstanding such provision, where an order has been made declaring the donor a mentally incompetent person and upon the appointment of a committee. Effect of declaration of mental incompetency

10. Where a person ceases to have legal capacity and has no attorney with the powers referred to in section 3, the surrogate court of the county or district in which he resides may, upon the application of any person who has a material interest, directly or indirectly, in the estate of such person and upon being satisfied that to do so is in the best interests of the person who is without capacity or his estate, appoint a person and vest him with the power of attorney for such limited purposes and upon such conditions as are set out in the order. Appointment of attorney by court

11.—(1) A power of attorney in Form 1 confers, Form of power of attorney

(*a*) on the donee of the power; or

(*b*) where there is more than one donee, on the donees acting jointly or acting jointly and severally, as the case may be,

authority to do on behalf of the donor anything that the donor can lawfully do by an attorney.

(2) A power of attorney in Form 1 which contains the express statement that it may be exercised during any subsequent legal incapacity of the donor, shall be deemed to be a power of attorney referred to in section 3.

PART II

Validity of acts or payments *bona fide* after decease or revocation

12.—(1) Every payment made and every act done under and in pursuance of a power of attorney, or a power, whether in writing or oral, and whether expressly or impliedly given, or an agency expressly or impliedly created, after the death of the person who gave such power or created such agency, or after he has done some act to avoid the power or agency, are notwithstanding such death or act, valid as respects every person who is a party to such payment or act, to whom the fact of the death, or of the doing of such act, was not known at the time of such payment or act *bona fide* made or done, and as respects all claiming under such last-mentioned person.

(2) Nothing in this section affects the right of any person entitled to the money against the person to whom the payment is made, and the person so entitled has the same remedy against the person to whom the payment is made as he would have had against the person making the payment.

R.S.O. 1970, c. 375, repealed

13.—(1) *The Powers of Attorney Act* is repealed.

Exception

(2) Notwithstanding subsection 1, *The Powers of Attorney Act* continues to apply in respect of powers of attorney executed before this Act comes into force.

Commencement

14. This Act comes into force on the day it receives Royal Assent.

Short title

15. This Act may be cited as *The Powers of Attorney Act, 1972*.

FORM OF POWER OF ATTORNEY

THIS GENERAL POWER OF ATTORNEY is given this _____ day of _____ 19 ___ by AB of _____

I appoint CD of _____ [or CD of _____ and EF of _____ jointly *or* jointly and severally] to be my attorney(s) in accordance with *The Powers of Attorney Act*.

In accordance with the said Act I hereby expressly confirm that this power is to be valid notwithstanding any subsequent mental incapacity on my part.

To be included if the power is to survive the donor's incapacity.

IN WITNESS etc.

Note: Section of *The Powers of Attorney Act*, 1972 provides that where the donor ceases to have legal capacity, this power ceases to be valid and has no effect unless the attorney files a notarial copy of this power in the office of the surrogate court of the county or district in which the donor or the donee resides not later than fifteen days after the donee first learns of the donor's legal incapacity.

APPENDIX "B"

"THE COMPANIES ACT" (C.C.S.M. C160)

Power of attorney not revoked by death.

61(3) A power of attorney contained in a duly executed instrument of transfer endorsed on or accompanying a share certificate delivered for value before the death of the transferor is not revoked by the death of the transferor but is valid and effectual subject to the conditions or restrictions, if any, contained therein.

"THE LAW OF PROPERTY ACT" (C.C.S.M. L90)

Effect of irrevocable power of attorney for value.

33(1) Where a power of attorney given for valuable consideration is in the instrument, creating the power expressed to be irrevocable; then, in favour of a purchaser,

(a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, disability or bankruptcy of the donor of the power;

(b) any act done at any time by the donee of the power in pursuance of the power is as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, disability or bankruptcy of the donor of the power, had not been done or happened; and

(c) neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, disability or bankruptcy of the donor of the power.

Acts of attorney after death of principal valid if bona fide.

34 Independently of any such special provision in a power of attorney, every payment made and every act done under and in pursuance of any power of attorney, or any power, whether in writing or oral, and whether expressly or impliedly given, or any agency expressly or impliedly created, after the death of the person who gave the power or created the agency, or after he has done some act to avoid the power or agency, is notwithstanding the death or act last aforesaid, valid as respects every person, party to the payment or act, to whom the fact of the death or of the doing of the act as last aforesaid was not known at the time of the payment or act bona fide done as aforesaid, and as respects all claiming under the last mentioned person.

R.S.M., c. 138, s. 35.

Payments to agent valid if made bona fide.

35(1) Any person making or doing any payment or act in good faith, in pursuance of a power of attorney, is not liable in respect of the payment or act by reason that, before the payment or act, the donor of the power had died or become lunatic, of unsound mind or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy or revocation was not at the time of the payment or act known to the person making or doing it.

Law of Property Act, Imp. 1925, c. 20, s. 124.

Savings.

35(2) This section does not affect any right of any person interested in any money so paid against the payee; and that person has the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

Am. R.S.M., c. 138, s. 36.

"THE REAL PROPERTY ACT" (C.C.S.M. R30)

Revocation or notice of death filed.

80(2) No registered power of attorney shall be deemed revoked by act of the parties thereto nor by death unless and until a revocation thereof is registered, or the registration is lapsed upon request, with evidence of death attached.

APPENDIX "C"

SPECIAL POWER OF ATTORNEY

KNOW ALL PERSONS BY THIS DOCUMENT

that I, _____
(name) (address)

_____
(occupation) (Soc. Ins. No.)

DO HEREBY CONSTITUTE and APPOINT, _____
(name)

_____
(address) (occupation)

— and —

_____
(name) (address)

_____
(occupation)

(if more than one)

my true and lawful attorney for me, until the appointment made by this document be revoked, and this appointment shall endure (unless revoked by me while I have a capable mind) into and through my last illness or any mental incapacity whatsoever which I may hereafter experience, and unto the end of my natural life.

(State here whether the attorney will be entitled to exact any personal expenses or personal remuneration, fees or honorarium. If there be personal remuneration, fees or honorarium state the amount per annum or other period, or the percentage. If none, draw a diagonal line through this space)

_____

_____

_____

_____

The attorney appointed hereby shall, within 15 days after acceptance, file a true copy of this document, with the Surrogate Court and with the Public Trustee of Manitoba. The attorney shall file an account of all his or her participation in any transactions of my money, real estate and personal property in the statutory form, yearly, with the Public Trustee *(donor only may negative this)*. Failure so to do may result in the prosecution and civil liability of the attorney.

The Special Power of Attorney is granted for _____
(state whether all *or*

_____ purposes.
the following)

_____

_____

_____

_____

And for all of the purposes aforesaid, I hereby give unto my said Attorney full and absolute power and authority to do whatever may be necessary to be done for such purposes, and also to sue or defend and to take such proceedings as may be necessary and expedient as fully and effectually as I could do if present and capable of acting in such matters.

IN WITNESS WHEREOF I have signed my name (or made my mark) this _____ day of _____ 19 ____ .

IN THE PRESENCE OF:

_____
(witness)

_____
(address)

_____
(occupation)

_____
(witness)

_____
(address)

_____
(occupation)

_____
(donor)

Note:

(1) Both witnesses must be present together to see the donor execute this Special Power of Attorney;

(2) Neither witness may be the Attorney or the spouse of the Attorney;

(3) Only one witness may be a member of the donor's immediate family i.e. a brother, sister, son, daughter, parent or spouse of the donor.

(4) One witness must be a physician, or surgeon, or barrister, or solicitor.

DEPOSITION OF WITNESSES

IN THE MATTER OF: A Special Power of Attorney given by

_____ to _____

on the _____ day of _____ 19 ____ .

I,_____ of the _____

of _____, _____ and,
(occupation)

I, _____ of the _____

of _____, _____
(occupation)

SEVERALLY SOLEMNLY AFFIRM

1. That I know _____ the donor of the above mentioned Special Power of Attorney and _he is the person who executed it in my presence;

2. That the time of executing the said Special Power of Attorney, the donor, _____, appeared to me to be of sound mind and _he appeared to understand that _he was granting to _____, the designated Attorney, powers which are to endure even if the donor should become mentally incapacitated.

3. That I am not the designated Attorney, nor the spouse of the designated Attorney.

(Strike out if neither witness be a family member)

4. That of us two witnesses, only _____, is a member of the donor's family.

SEVERALLY SOLEMNLY AFFIRMED

before me at the _____

of _____ in the

Province of Manitoba, this _____

day of _____ 19 ___

_____

_____

(A Commissioner for Oaths, etc.)

ACKNOWLEDGEMENT OF ACCEPTANCE

I,_____ of the_____

of _____ in Manitoba, hereby accept the powers conferred upon me by _____ the donor in the (within) (attached) Special Power of Attorney executed on the _____ day of _____, 19 ____.

I am aware that the said Special Power of Attorney will have no force or effect unless a true copy of it (with this acceptance) be filed in each of the offices of the Surrogate Court and of the Public Trustee within 15 days of this my acceptance; and that if the Attorney purports to exercise those powers conferred on the Attorney while they are of no force or effect the Attorney will be liable to prosecution and civil suit.

I am aware that the Attorney must annually file accounts, as provided by statute, with the Public Trustee of Manitoba.

I am aware that the powers conferred upon the Attorney, unless sooner lawfully revoked, will survive any subsequent mental incapacity of the donor.

The Attorney accepts and agrees to the provision in the Special Power of Attorney regarding expenses, remuneration, fees or honorarium, and acknowledges that the Attorney may (not) charge or exact expenses, remuneration, fees or honorarium as stipulated in the Special Power of Attorney.

IN WITNESS WHEREOF I have hereunto signified Attorney's acceptance by signing my name this _____ day of _____ 19 ____ .

In the Presence of

_____ (witness)

_____

YEARLY ACCOUNT

In the matter of a Special Power of Attorney given by

_____ of _____
(name of donor) (address)

in favour of _____
(name(s) of attorney)

_____
(address(es))

_____
(occupation(s))

I/we, the said _____
(name(s) of attorney)

account as follows:

1) For and on behalf of _____ I/we have sold the following
(donor)

Real or Personal property because:

_____
(reason for sale)

2) For and on behalf of _____ I/we have received the following money and deposited it all as indicated:

Item	Amount	Rec'd From	Date	Bank or Other Depository

Of the above sums, items _____ represent a return or gain of capital and items _____ represent income. Return of capital is represented by items _____ . Items not included in the foregoing are _____ representing _____

3) For and on behalf of _____ I/we have expended the following, etc.