

## Inter-Provincial Recognition of Substitute Decision-Making Documents

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**Report Commented On:** Alberta Law Reform Institute, *Inter-Provincial Recognition of Substitute Decision-Making Documents*, [Report for Discussion 32](#)

The Alberta Law Reform Institute (ALRI) is considering changes to the statutory rules governing recognition of substitute decision-making documents (enduring powers of attorney, personal directives etc.) that originate outside of Alberta. It recently published *Inter-Provincial Recognition of Substitute Decision-Making Documents*, Report for Discussion 32. The report reviews the issues with the existing law, considers the uniform provisions recently proposed by the Uniform Law Conference of Canada (ULCC) and makes preliminary recommendations for reform. Before it makes final recommendations to the Alberta government, ALRI is seeking feedback on the questions and proposals below.

### The Problem

An individual may use a substitute decision-making document to authorize another person to act on his or her behalf. Enduring powers of attorney are generally used to authorize another person to act on the individual's behalf with respect to property, financial or legal matters, while personal directives are generally used for health care and personal matters.

A valid substitute decision-making document must comply with the formal requirements of the jurisdiction where it is executed. However, these formal requirements differ from province to province. This means that a substitute decision-making document cannot automatically be used in a jurisdiction other than the one where it was made. This creates problems for individuals who own assets or spend significant time in more than one jurisdiction.

Most Canadian provinces and territories have statutory rules governing recognition but, again, they vary from place to place. Even within Alberta, the recognition rules differ depending on which type of document is being recognized. For example, under the *Powers of Attorney Act*, [RSA 2000, c P-20](#), an out-of-province enduring power of attorney will be recognized as valid in Alberta if, according to the law of the place where it was executed, it complies with all the necessary formalities and it survives the mental incapacity of the donor (s 2(5)). In contrast, the *Personal Directives Act*, [RSA 2000, c P-6](#), stipulates that an out-of-province personal directive will be recognized as valid in Alberta only if it complies with the formal requirements of Alberta's legislation (s 7.3).

In those provinces that do not have statutory recognition rules, a court application based on conflict of laws rules may have to be made to compel recognition of the substitute decision-making document. If recognition is refused and the individual has already lost capacity, the only

option for dealing with his or her affairs is to make a court application for the appointment of a guardian or trustee.

One way to avoid these types of problems is to have multiple substitute decision-making documents drafted in accordance with the formalities of every jurisdiction where an individual owns property or intends to reside or relocate. However, the time and expense required to put in place multiple substitute decision-making documents, for both property and health care, will add up quickly and make this solution impractical for many. Moreover, in cases where an individual moves from one jurisdiction to another after losing capacity, drafting a new substitute decision-making document that conforms to the requirements of the new jurisdiction is not even an option. Uniform recognition provisions would go a long way towards alleviating these issues.

## **The Project**

In August 2016, the ULCC adopted the [\*Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act\*](#) (Uniform Act) as suitable for implementation across Canada. It is the result of a joint project between the ULCC and its American counterpart, the Uniform Law Commission, and proposes a three-part approach to recognition. First, it recognizes the validity of substitute decision-making documents created under the law of another jurisdiction. Second, it proposes two options for the choice of law rule. Third, it supplements the existing framework in most jurisdictions by providing rules governing acceptance, refusal and good faith reliance. ALRI's Report for Discussion 32 analyzes whether the Uniform Act is suitable for implementation in Alberta.

## **The Proposals:**

The core policy question dealt with in the Report for Discussion is whether Alberta should adopt one of the ULCC's options for the choice of law rule. The choice of law rule determines which system of law will be used to determine both the formal validity and the essential validity of a substitute decision-making document.

Formal validity refers to the legal requirements that are necessary to make a valid substitute decision-making document. For example, the number of witnesses required to execute the document or whether the document must be notarized are matters that relate to formal validity. Essential validity refers to the existence and extent of the powers granted by the document. For example, whether the authority to consent to health care extends to all forms of medical treatment is a matter that relates to essential validity.

The Uniform Act proposes two options for the choice of law rule. Option 1 distinguishes between formal validity and essential validity and applies a different choice of law rule to each. Under Option 1, the substitute decision-making document will be considered formally valid if it complies with the requirements of the jurisdiction indicated in the document. If no jurisdiction is indicated, then it will be considered formally valid if it complies with the formalities of any of the following jurisdictions:

- The jurisdiction of execution;

- The jurisdiction of the grantor’s habitual residence at the time of execution; or,
- Alberta.

Once it is determined that the document is formally valid, essential validity must be considered. Under Option 1, essential validity is determined by the law of the jurisdiction expressly indicated in the document, provided the grantor is a national or former habitual resident of that jurisdiction, or the subject property is located in that jurisdiction. If no jurisdiction is indicated, or if the grantor does not have the necessary connection to the jurisdiction indicated, then essential validity is determined by the law of the jurisdiction where the grantor was habitually resident at the time of execution.

Under Option 2, no distinction step is required. Both formal validity and essential validity are determined according to the same choice of law rule that determines essential validity under Option 1 (described above).

The first issue that arises when deciding between Option 1 and Option 2 is whether there should be a distinction made between formal validity and essential validity when applying the choice of law rule. ALRI is of the view that such a distinction should be made. It is the approach typically used with respect to wills and health care directives, and the body of case law governing the distinction between formal validity and essential validity is well developed and generally easy to apply. Thus, ALRI’s first preliminary recommendation is that the recognition of substitute decision-making documents should distinguish between formal validity and essential validity when applying the choice of law rule.

Before making a preliminary recommendation with respect to the law applicable to formal validity, ALRI is seeking feedback on the four jurisdiction options proposed by the Uniform Act. Most often, the people and institutions that are asked to recognize substitute decision-making documents are non-lawyers; thus, it is important that the choice of law rule for formal validity is relatively straightforward and easy to apply.

Keeping in mind that the ease of the use of the recognition provisions should be paramount, the Report for Discussion asks for comments on the following question: Which jurisdictions should be included as options to assess formal validity when recognizing a substitute decision-making document in Alberta? (Choose all that apply).

- The jurisdiction indicated in the document.
- The jurisdiction of execution.
- The jurisdiction of the grantor’s habitual residence at the time of execution.
- Alberta.
- Other (please specify).

The remaining key proposals are:

- The grantor should be able to specify the jurisdiction governing essential validity directly in a substitute decision-making document, provided that he or she has a connection to that jurisdiction through nationality, former habitual residency or property ownership.

- If there is no jurisdiction indicated in the document, or if the jurisdiction indicated does not meet the connection requirements, then the essential validity of a substitute decision-making document should be determined in accordance with the law of the grantor’s habitual residence at the time of execution.
- The law governing recognition of a substitute decision-making document should include a public policy exception.
- Alberta should implement the provisions of the Uniform Act dealing with mandatory acceptance, good faith reliance and liability for illegitimate refusals.
- The Uniform Act’s definition of “substitute decision-making document” should be expanded to include documents that contain advance instructions, whether or not they contain a delegation of authority.

ALRI is seeking feedback on all of these questions and proposals, before making final recommendations. Any interested person can give feedback by completing an upcoming survey, which will soon be available on ALRI’s website. You can also send comments to ALRI at the address below:

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