

POWER OF ATTORNEY



By writing a power of attorney, you can give another person authority to act on your behalf in case you are sick or become unable to make decisions about your affairs.

LEGAL INFOⁱ
NOVA SCOTIA



What is a power of attorney?

A power of attorney is a legal document that lets you give another person authority to act in financial and property matters on your behalf. If you let someone act on your behalf, you might hear someone call you the **donor** or grantor. The person receiving the authority is called the **attorney** (even if they aren't a lawyer). Giving someone a power of attorney does not limit you from acting on your own behalf. You still have control of your financial affairs and are free to deal with your property, money, and investments.

To give someone else authority to make personal or health care decisions for you, you need a personal directive. See the section on **Health Care Treatment and Consent** or go to www.novascotia.ca/just/pda/.

You don't have to give someone else power of attorney. But it is a way for you to choose who will act for you if you can't act for yourself.

Why would I need a power of attorney?

Here are some reasons to write a power of attorney:

- You are too sick to deal with your financial affairs and you need someone to take over for you until you get better.
- You can't get around very well and you want to let someone deposit and withdraw money from your bank account.
- You are travelling or working away from home and you want to allow someone to deal with your financial affairs while you are away.
- You have an illness that will lessen your ability to make decisions or to move around in the future, and you want to plan for that.
- You want to make arrangements now while you are well and competent to prepare for the unexpected. **Competent** means able to make important decisions for yourself. If something like an accident should limit your ability to deal with your affairs or to get around, you will be ready.

Power of attorney for persons registered under the Indian Act who ordinarily live on reserve

The federal *Indian Act* has rules for making powers of attorney that apply to persons registered under the *Indian Act* who ordinarily live on reserve or on Crown lands. The *Indian Act* does not apply if you have status under the *Indian Act* and live off-reserve, or if you do not have status under the *Indian Act* and live on-reserve. Provincial laws apply instead.

If you have status under the *Indian Act* and ordinarily live on a reserve or Crown lands, you can get information about powers of attorney from:

- Indigenous Services Canada online www.canada.ca/en/indigenous-services-canada.html, under 'Indian Status', then 'Estate Services for First Nations'

- the Confederacy of Mainland Mi'kmaq (CMM) has a Mi'kmaq Wills and Estates series which includes:
 1. Book One: How to Write a Will
 2. Book Two: How to Settle an Estate
 3. Book Three: How to Write a Power of Attorney and Personal Directive
 4. Mi'kmaq Wills and Estates & Matrimonial Real Property

Go to cmmns.com/program/wills-estates/ for more information.

- a lawyer who does wills and estates law, and who knows about Aboriginal law and the rules that apply to power of attorney for persons registered under the *Indian Act* who ordinarily live on reserve or on Crown lands.

▶ If I give someone my power of attorney, can I still act on my own behalf?

Yes. If you give someone your power of attorney, you can still make your own decisions until you become unable to do so.

▶ How much authority can I give in a power of attorney?

You choose what powers to give your attorney. There are two levels of responsibility:

- A general power of attorney gives your full authority to your attorney. There are no limits on what they can do on your behalf.
- A specific power of attorney says exactly what you allow your attorney to do on your behalf. It limits what your attorney can do.

A specific power of attorney is most often used when you need someone to sell a piece of land for you or to deal with a bank account for you. It is important that a specific power of attorney include all steps involved in the work you want done. For example, a power of attorney to buy a piece of land should include the power to sign all the needed documents and it may be time-limited for a period of weeks or months.

▶ What duties does my attorney have?

Your attorney has a duty to take good care as they carry out what you have allowed them to do. This includes the duty to:

- stay within the authority you have given,
- use reasonable care and skill,
- act in your best interests,
- not profit personally from what is done for you (although you can specify how the attorney is compensated for helping you).

Do I need a lawyer to write a power of attorney?

No. The law does not say that a lawyer must write your power of attorney, but it is wise to at least speak to a lawyer about it. You can write your power of attorney yourself. You can fill in a blank form; you can buy one from a store or download one from the internet. There are also books and kits available for powers of attorney.

A power of attorney is an important legal document and it must be worded carefully to make sure that it says what you want. If a lawyer makes a mistake, insurance can cover the situation. Among other things, a lawyer can:

- make sure the power of attorney is clear about how much authority you give to your attorney,
- make sure that your power of attorney covers all the steps needed to do what you want done,
- make sure the power of attorney meets all the legal requirements,
- tell you about standard clauses to provide for unexpected events,
- tell you about options for wording the power of attorney,
- tell you about things you can do now to make it easier for your attorney to deal with your affairs later,
- answer any questions you might have,
- help you understand better what can happen when you give someone power of attorney,
- give proof that you had legal capacity when you made your power of attorney,
- give proof that you made your power of attorney by your own free choice, and free of undue influence.

If you decide to write your own power of attorney, ask a lawyer to look it over. Ask them to make sure that it meets all the legal requirements and allows your attorney to do what you want.

Very important: get advice from a lawyer if you want a specific or a springing power of attorney. These documents must be written carefully to meet each person's unique needs, and a lawyer should check them.

Lawyers charge a fee based upon the amount you want them to do. The fee depends on how complex the work is. You should discuss fees with the lawyer before you decide to hire them.

What does it cost for a lawyer to do a power of attorney?

Can I buy a power of attorney form?

You may be able to find a form online. Some office supply stores may have forms for general powers of attorney. There are also books that provide examples of forms.

How much will it cost?

There is no standard form for a specific power of attorney because the wording will depend on what powers you want to give your attorney. You or your lawyer will have to draw up the form to fit your needs. You will usually need a special form from your bank if you want your attorney to access your bank account.

A general power of attorney form from an office supply store costs a few dollars. Banks do not charge a separate fee for their power of attorney forms.

The cost for lawyers' fees will depend on how long it takes to draw up the power of attorney and the number of times the lawyer meets with you. You should ask the lawyer about their fees. Most lawyers charge a flat fee for doing a power of attorney. For information about finding a lawyer, visit the Legal Information Society of Nova Scotia website (www.legalinfo.org) and click on "How we can help" and then on "I need a lawyer."

Other costs:

- Your attorney may have small expenses, such as for postage and telephone.
- If your attorney is a lawyer and you ask them to do legal work like buying property, they may charge for doing that work.
- The Public Trustee and trust companies charge fees for acting as your attorney. Fees are based on the value of your estate and your income.

A friend or relative is not entitled to a fee unless there is an agreement between the two of you for payment. In that case, you should include the terms of payment in the power of attorney document. Often a family member or a friend acts as an attorney without payment.

What are the general legal requirements for a power of attorney?

The legal requirements are:

Adult: In Nova Scotia, you must be aged 19 or older to:

- give a power of attorney, or
- act as attorney under a power of attorney.

Capacity: You must be mentally competent to give someone power of attorney. This is also called having legal capacity. It means you:

- know that you are making a power of attorney and
- understand what it means to give a power of attorney.

If you become mentally incompetent after you have made your power of attorney, the power of attorney is no longer valid unless it is an **enduring power of attorney**. **Mentally incompetent** means you can no longer make your own decisions.

Mental competence to make a power of attorney can be an issue if a person's ability to think clearly is affected by illness, drugs, or pain. You should make your power of attorney or enduring power of attorney while you are in good health so that no one questions your mental competence.

The person who is named as an attorney under a power of attorney must understand what it is to receive a power of attorney.

Written: Your power of attorney must be in writing.

Signed: You, the donor, must sign your power of attorney. It is wise to put it under "seal." Sealing means that someone has attached a red seal to the document opposite the donor's signature. You can buy seals at an office supply store. If you want your attorney to buy or sell property for you, the power of attorney must have a seal on it.

Often, another person witnesses the donor's signature. This is not needed for an ordinary power of attorney but people often do it.

An enduring power of attorney is different: it must be witnessed. The witness must be at least 19 years old and cannot be the attorney or the attorney's spouse.

If you cannot sign your name, you can place your mark on the power of attorney. A mark is a cross or other symbol used in place of a signature. A witness should sign a statement saying that you made the mark. This statement is called an affidavit of execution.

If you have a visual impairment, you must ask someone to read the contents of the document to you before you sign it or place your mark. A witness must sign an affidavit that someone read the document to you and that you understood it before you sign it or place your mark on it.

What is an affidavit of execution?

An affidavit of execution is a witness's statement that they saw you sign the power of attorney, and that you were of the age of majority (at least 19 years old in Nova Scotia) when you signed it. The witness signs the affidavit of execution.

An affidavit of execution can be made any time after you sign your power of

attorney. It is best to do it right after the power of attorney is signed.

People often do an affidavit of execution for a power of attorney, even though the law does not say you must do one. For example, if you want your attorney to buy or sell land for you, the Land Registration Office will need an affidavit of execution.

A Commissioner of Oaths or a notary public must confirm that the affidavit of execution is true. All lawyers are Commissioners of Oaths. But you can also find notaries public and Commissioners of Oaths in the Yellow Pages, or visit the Legal Information Society of Nova Scotia website at www.legalinfo.org for ways to find one.

For more information on recording your power of attorney at the Land Registration Office, see these sections:

- Can a power of attorney be used to buy and sell land?
- Do powers of attorney have to be registered in Nova Scotia?

► Is there anything else I should include in a power of attorney?

The following are not legal requirements, but they are a good idea:

- Put the date on the document.
- Put your initial and page number on each page so pages cannot be replaced or removed.
- Someone who is a competent adult and is not the attorney or the attorney's spouse should witness your signature. That person should sign their name on the document. The witness does not need to know what is in your power of attorney.
- Arrange for the witness to swear an affidavit of execution.

An enduring power of attorney must be witnessed.

► Who can be my attorney?

Anyone who is at least 19 years old and who is mentally competent can be your attorney. You should choose someone you trust and who will carry out your wishes.

If you do not wish to give a relative or friend power of attorney, you can appoint a lawyer or trust company. Also, depending on the circumstances, the Nova Scotia Public Trustee might agree to act as your attorney. The Public Trustee is a government office that manages the affairs of some people who cannot do it for themselves. Contact the Nova Scotia Public Trustee for more information or see the Public Trustee website at www.novascotia.ca/just/pto.

It is important to discuss your wishes with the person you plan to name as your attorney. The person you name does not have to act as your attorney. They can choose not to accept the role. For this reason, you should also name a back-up attorney.

Does the person receiving the power of attorney have to sign the document?

No. The attorney does not have to sign the power of attorney document. But if they need access to any bank account, they will have to sign documents at each bank, trust company, and credit union where you have an account that the attorney will use. Each institution will also have its own forms for you or your attorney to fill out.

Can the person I choose as my attorney decide not to act?

Yes. Before you write your power of attorney, ask the person you want as your attorney if they will take on the job. If they refuse, you must appoint someone else. You should also ask someone to act as a back-up attorney.

If you do not name a back-up power of attorney and your attorney tells you they no longer want to act as your attorney, your attorney will automatically be cancelled.

Can my attorney do my taxes?

Yes, but usually only if you include a special clause in your power of attorney that allows them to deal directly with the Canada Revenue Agency on your behalf.

Can a power of attorney be used to buy and sell land?

Yes, if you give your attorney that authority in your power of attorney. If you want your attorney to deal with land, your power of attorney must be recorded at the Land Registration Office where the land is located before the sale or purchase takes place. The power of attorney must be signed under seal and have an affidavit of execution.

You can find phone numbers for Land Registration Offices in the blue Government pages of the phone book under Land Registration or visit www.novascotia.ca for locations. There is a fee to record documents. Fees change from time to time. Contact staff at the Land Registration Office for information on fees for recording documents.

Land transactions done with a power of attorney are not valid until the power is registered.

What is an enduring power of attorney?

An **enduring power of attorney** is a special power of attorney document. It clearly says that your attorney's power to act for you continues even if you can no longer make decisions for yourself. This is called becoming mentally incompetent or losing legal capacity.

An ordinary power of attorney would no longer be valid and could not be used if you became mentally incompetent or could no longer make

important decisions. In that case, you might need a **representative** to handle your affairs.

For information on adult representation, go to the Nova Scotia Public Trustee's website at www.novascotia.ca/just/pto, under Adult Capacity and Decision-making.

▶ Should I have an ordinary power of attorney or an enduring one?

The kind of power of attorney document you have depends upon your needs. Every situation is different, so you should speak with a lawyer about what is best for you in your situation.

An ordinary power of attorney gives someone authority to take specific action for you at specific times. For example, people in the military may allow someone to handle their banking while they work outside of Canada. Enduring powers of attorney are more common as they allow someone to act for you when you cannot act for yourself.

If you want the person named in your power of attorney to be able to continue to act if you become mentally incompetent, then you will need an enduring power of attorney.

If you already have an ordinary power of attorney, talk with your lawyer about whether you should replace it with an enduring power of attorney.

▶ What is a springing power of attorney?

A springing power of attorney is a special power of attorney document that says what event will make it "spring" into effect. That event could be if the donor loses capacity to make their own property and financial decisions. Another example is if a business owner needs someone else to run their business for a short time.

Many people have powers of attorney that are both springing and enduring. This means the power of attorney comes into effect when the donor cannot make their own decisions, and it continues until the donor can make decisions again.

▶ What can happen if I do not have an enduring power of attorney?

If you become mentally incompetent and cannot take care of your affairs, a relative or friend may ask a court to appoint a representative to handle your affairs. This might not be the person that you would have chosen.

For information on adult representation, go to the Nova Scotia Public Trustee's website at www.novascotia.ca/just/pto, under "Adult Capacity and Decision-making Act."

POWER OF ATTORNEY

When is it too late to give a power of attorney?

It is too late to give a power of attorney if you become mentally incompetent and are not able to make important decisions for yourself. For example, this can be an issue if you have progressive dementia. In this situation, you might need a medical opinion about your capacity to give a power of attorney. If you do not have capacity, a family member or other caring person might apply to court to be named as your representative decision-maker under the *Adult Capacity and Decision-making Act*.

Are there special requirements for an enduring power of attorney?

Yes. An enduring power of attorney has the legal requirements of an ordinary power of attorney, plus two more:

- Someone who is competent, at least 19 years old, and who is not the attorney or the attorney's spouse must witness that you signed it.
- It must say that it will still be in effect if the donor loses capacity to make important property and financial decisions.

These special requirements are set out in the Nova Scotia *Powers of Attorney Act*.

What happens if I become mentally incompetent?

If you become mentally incompetent, or unable to make important decisions, the power of attorney becomes invalid unless you have an enduring power of attorney. An enduring power of attorney says that you wish the power to continue even if you become mentally incompetent.

If you do not have an enduring power of attorney and you become mentally incompetent, the court may name a representative under the *Adult Capacity and Decision-making Act* to handle your affairs. Go to the Nova Scotia Public Trustee's website at www.novascotia.ca/just/pto/ for information about the *Adult Capacity and Decision-making Act*.

Can my attorney consent to medical treatment for me?

Only if you give them the authority to do so. The Nova Scotia *Personal Directives Act* lets you choose a person to consent to medical treatment for you if you can no longer give consent. That person is called your delegate.

Allowing someone to give medical consent for you is usually done in a separate document called a personal directive. If you included consent to medical treatment in a power of attorney prepared before April 1, 2010, it is still valid.

You can learn more about personal directives in the section on Health Care Treatment and Consent, and at www.legalinfo.org/forms/personal-directive.

If you decide to include medical consent, your power of attorney must be in writing, and you and a witness must sign it. The witness cannot be your delegate or your delegate's spouse. Both you and your delegate must be at least 19 years old and must be mentally competent.

Where should I keep my power of attorney?

You should put your power of attorney document in a safe place. A fire-proof location is the best place. Make sure you tell your attorney where the document is stored so that they can find it if it is needed.

If you want your attorney to start using the power immediately, give it to them. Keep a copy for yourself in a safe place. Give a copy to your bank, credit union or trust company, and to any other parties that your attorney will deal with for you. Keep a list of the businesses and people who have copies of your power of attorney in case you have to make any changes.

If you have a power of attorney that may not be used for a while, perhaps never, do one of these things:

- Put it in a safe place that your attorney can access quickly, if they need to, and tell them where it is.
- Leave it with another person you trust, such as a lawyer, and give clear instructions about when to release it. Remember, though, that this person could die or move away.
- Give it to your attorney to keep in a safe place until it is needed.

Do not put your power of attorney in a safe deposit box that is in your name only, as your attorney may not be able to get access to it quickly. It may be many years before your power of attorney is needed, if it ever is needed.

As time passes, keep track of where you are keeping your power of attorney. Tell the people in your life who need to know about your power of attorney where to get it when it is needed.

How does a power of attorney end?

A power of attorney can end in any one of the ways listed below.

Very important: You can end a power of attorney at any time and should do so if your attorney is abusing the power you gave them.

You should always name a back-up attorney in your power of attorney. If your first choice is not able to act for any reason, your back-up attorney takes over authority to act on your behalf and your power of attorney document stays in effect.

If you do not name a back-up attorney, your power of attorney document will have no legal effect after your attorney:

- dies,
- becomes incompetent, or
- gives you notice that they no longer want to act for you.

You should give written notice when a power of attorney is cancelled or when an attorney's authority ends. Any person or business that deals with the attorney will think the power of attorney is valid unless they are told it is not.

Notice by the donor: You can end a power of attorney by telling the attorney in writing. This is called giving notice. The notice must be in writing and dated, and you must sign it.

If you cancel your power of attorney, you should also do the things below:

- Write to all the people and businesses who deal with the attorney. Tell them that the power of attorney has been cancelled. Keep a copy of the letters.
- Ask everyone who has a copy of the document to return it to you. Banks and some other organizations may need to keep a copy of the document for their files.
- Contact the Land Registration Office if the power of attorney is registered there. Find out what needs to be done to put notice of your cancellation on the record. You do not need to do this if the power of attorney was for a specific time period that has ended or for a task that has been completed.

Notice by the attorney: Your attorney can give you notice that they no longer want to act as attorney. You should write to the bank and others and tell them that the power has been cancelled. Keep a copy of these letters. Ask your attorney to return the power of attorney document to you.

Mental incompetence: If you cannot make important decisions for yourself, your power of attorney ends automatically unless it is an enduring power of attorney.

If your attorney becomes mentally incompetent and you have not named a back-up attorney, your power of attorney ends automatically. This is the case whether it is an ordinary or an enduring power of attorney.

When the Public Trustee is acting for someone who becomes mentally incompetent, the Public Trustee will continue to act for that person.

Death: When you die, the power of attorney ends.

If the attorney dies, the power of attorney ends unless you have named a back-up attorney.

If the Public Trustee is acting for a person who dies without a will naming an executor, they will continue to act until a court appoints someone to

administer the estate. For more information, see the section Public Trustee or go to www.novascotia.ca/just/pto/.

Bankruptcy: If you become bankrupt, your power of attorney ends and a licensed bankruptcy trustee takes over all your financial affairs. A bankruptcy trustee is a licensed person who manages the affairs of a bankrupt person.

If your attorney becomes bankrupt, your power of attorney is not automatically cancelled. It is only cancelled if the bankruptcy makes your attorney unfit to carry out their duties.

If your attorney is unfit to carry out their duties, your back-up attorney takes over and acts on your behalf, and your power of attorney document remains in effect.

Time or task: A power of attorney can be for a specific time or task. When the time or task is complete, the power of attorney ends.

For example, you might give someone specific power of attorney to sell a house. The attorney's authority under that document would end when the house is sold.

In another example, you might give a general power of attorney while you are away on vacation. The attorney's authority under that document ends when you return.

If a specific power of attorney allows the attorney to act over time, the power continues until it is cancelled in one of the ways listed above.

A general power of attorney may continue indefinitely or it may be for a specific time.

A power of attorney only has to be registered when it gives authority to deal with land. Then it must be registered at the Land Registration Office where the land is located.

Power of attorney gives someone else power to act for you. Banks and other financial institutions rely on the written power of attorney document. If you give your attorney power to withdraw money from your bank accounts, to deal with your property, or to buy and sell investments on your behalf, the bank will not usually contact you to see if you approve of what the attorney is doing.

Most people who are named in a power of attorney are honest. They try to do a good job and help you as they said they would and live up to their obligations.

▶ Do powers of attorney have to be registered in Nova Scotia?

▶ What are the risks of giving someone my power of attorney?

There is a risk though that the attorney could abuse that power because they believe that they know what is best for you, or they want to get money or property for themselves.

What can I do to prevent misuse of a power of attorney?

Here are some things you can do help stop someone from abusing a power of attorney:

- Choose carefully. Choose an attorney you can trust who will respect your wishes.
- Continue to pay attention to your affairs. Ask your attorney questions. Get regular statements and updates. Do not give up all control to that person.
- Require your attorney to give you, or someone else if you become incompetent, regular updates on how they are managing your affairs.
- If you have a lot of savings, property, or investments, think about appointing a lawyer or a trust company to act on your behalf. Look carefully into the costs of this before you make a decision.
- Give a specific rather than a general power of attorney, unless you find that you must give your full authority. For example, if you need your attorney to deal with just one bank account, then give them power to do only that.
- Check your bank statements and cancelled cheques carefully. You can put a limit on the amount that your attorney can withdraw from your accounts. If the attorney wants to withdraw more than that amount, then you would have to tell your bank that you agree.
- If you have investments, arrange for your investment dealer to keep you informed about all dealings. You can also arrange for them to inform a third person if you become incompetent.
- Make a list of your property, jewellery, savings, furnishings, and investments. Keep it up to date. Give a copy to the person named in your power of attorney and to at least one other person you trust.
- Tell your banks, financial institutions, and investment dealers to tell you about any transactions over a set limit.

What can I do if my attorney misuses the power of attorney?

Below is a list of things you can do if your attorney misuses the power of attorney. What you do will depend on your situation and on your relationship with your attorney:

- At the very least, talk over your concerns with a lawyer or someone else you trust.
- Ask your attorney to account for how they have managed your affairs.

- You can cancel their authority under your power of attorney and use your back-up attorney. If you did not name a back-up attorney, you could cancel the power of attorney.
- It is a criminal offence to misuse a power of attorney. If your attorney is using your property or money for their own benefit without your consent, you should talk with a lawyer and the police.
- If you have an enduring power of attorney and later become incompetent, your attorney can be required to report on how they have managed your property. The application would be made to the Supreme Court of Nova Scotia by someone who believes that your attorney abused their power. The court could order the attorney to account to the Public Trustee. The court can also remove the attorney and appoint someone else to manage your affairs.
- An attorney can be ordered to give reports to the Nova Scotia Public Trustee Office.

Under the *Adult Protection Act*, if an attorney or representative is neglecting the adult's property or dealing with it in a way that is not in their best interests, or if an adult is in need of protection, a judge may inform the Public Trustee. The Public Trustee also looks into complaints about a representative under the *Adult Capacity and Decision-making Act*. For more information on the Public Trustee go to www.novascotia.ca/just/pto/.

► Is a power of attorney made outside of Nova Scotia valid here?

The legal requirements of powers of attorney change from province to province. Your power of attorney may be valid if it was made outside Nova Scotia. To find out for sure, ask a Nova Scotia lawyer to see if it meets the requirements of the law here.

► Is my power of attorney valid outside of Nova Scotia?

If your attorney may need to use the power of attorney outside Nova Scotia, check with a lawyer to see if you should write another power of attorney for that province or country. For example, say you and your spouse spend the winter in Florida and you have given each other power of attorney. You should ask a lawyer whether your powers of attorney meet the requirements of Florida law.

Where can I get more information on making a power of attorney?

Legal Information Society of Nova Scotia (LISNS)
Legal Information Line
902-455-3135
1-800-665-9779
Email: questions@legalinfo.org

LISNS has online information about powers of attorney at www.legalinfo.org

The Legal Information Society of Nova Scotia can also refer you to a lawyer who does powers of attorney.

More information

- Contact a lawyer in private practice who works on wills and estates. See the Legal Information Society of Nova Scotia website at www.legalinfo.org for ways to find a lawyer.
- Visit www.seniors.gc.ca to read “What every older Canadian should know about Powers of Attorney and Joint Bank Accounts,” a federal and provincial government publication.