

# POWER OF ATTORNEY KIT

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The donor of a power of attorney confers upon another person significant rights and powers as specified in the power of attorney and should, therefore, always obtain independent legal advice separate and apart from the attorney named in the power of attorney. In the absence of such independent legal advice, the power of attorney may be voidable.

Please note that in Samples 1 and 2, we recommend that you use a notary public or lawyer as a commissioner for taking oaths (see Chapter 2, section 3).

**Note:** The download kit included with this kit contains a link to applicable updates and/or downloads. Please install the download kit and check for updates to ensure you have the most current information.

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# 1 INTRODUCTION

## 1. What Is a Power of Attorney?

Simply stated, a power of attorney is a written document by which you grant to someone the authority to act on your behalf on various matters, including, in some provinces, matters dealing with your health. A power of attorney can be a very useful device in the management of your affairs during your lifetime, particularly as you grow older. For example, you might grant a power of attorney to your child to enable him or her to manage your affairs after a certain age.

A power of attorney is different from a will, which provides for the orderly distribution of your estate *after* your death; in most situations, a power of attorney terminates upon your death.

The person who gives the authority is called the *principal* or the *donor*; the person to whom the authority is given is called the *agent*, *donee*, or *attorney*. You can appoint your attorney to carry out the following acts:

- Negotiating cheques, bills of exchange, promissory notes, etc.
- Purchasing, selling, or dealing with stocks and bonds.
- Collecting rents, profits, commissions, etc.

- Managing, buying, and selling real estate.
- Conducting business operations.
- Deciding issues about your personal care in Ontario, Manitoba, New Brunswick, and British Columbia.

**Note:** The donor of a power of attorney confers on another person significant rights and powers as specified in the power of attorney and should, therefore, always obtain independent legal advice separate and apart from the attorney named in the power of attorney. In the absence of such independent legal advice, the power of attorney may be voidable.

## 2. Agency

Because the law of agency applies to powers of attorney, it is helpful to understand some of the concepts of that law.

The relationship between an agent and a principal is called an agency. An agency is created when one person, the agent, is given the authority to act on behalf of another person, the principal. An example of an agent that many people use is a real estate agent. Generally, a real estate agent is appointed to act for a principal on certain transactions dealing with real estate. The authority is given to the real estate agent in the listing agreement and in the agreement of purchase and sale. In those documents, the agent's terms of appointment, duties, and remuneration are set out.

An agent is not an employee or an independent contractor. Legally, an employee works under the direct control and supervision of an employer and is bound to perform within the employer's guidelines and directives; an independent contractor is free to perform work as he or she sees fit and is bound only to produce the result defined by a specific contract. Although he or she is bound to perform duties according to the principal's instructions, an agent is not normally under direct supervision like an employee, but neither is he or she free to act like an independent contractor. An agent must be instructed and guided by the agency contract.

## 3. How Is an Agency Created?

A contract of agency or power of attorney is created when two people formalize an agreement between them. Generally, this is done by signing a document in front of a witness and having the witness swear an affidavit that he or she saw the document signed.

## 4. Who Can Be a Principal and an Agent?

Generally, whatever you have the power to do yourself, you can do by means of an agent. Similarly, whatever you do not have the power to do yourself, cannot be done through an agent.

If you can legally enter into a contract, you may grant a power of attorney. In most cases, only the following cannot grant a power of attorney or be a principal:

- An enemy alien (i.e., a person whose country is at war with Canada or has hostile relations with Canada).
- An infant (i.e., any individual younger than the age of majority, subject to certain exceptions — e.g., a married person, even if an infant, can grant power of attorney. Note that the age of majority varies from province to province).
- Persons of unsound mind.
- Corporations (**Note:** A corporation's right to appoint a power of attorney can be limited by its articles of incorporation. If the articles do not permit appointment of an attorney and the appropriate legislation does not have ancillary powers to do so, the corporation cannot appoint an attorney).