Bob Reid

A Springing Power *of* Attorney

The BC Court of Appeal in *Goodrich v. British Columbia (Registrar of Land Titles)*, [2004] BCCA 100, allowed the appeal from the judgment of Madam Justice Wedge, [2002] BCSC 599, and interpreted *the Power of Attorney Act,* RSBC 1996, c. 370, to allow a "springing power of attorney" that becomes operative when the donor becomes mentally infirm.

The facts of the case are straightforward. Edith Parnall granted a power of attorney to her nephew Norman Goodrich, whom she trusted. She initially wanted to give him an enduring power of attorney that would take effect immediately and also allow him to make decisions for her after she became incompetent. But her solicitor advised her to make the power of attorney conditional on her becoming mentally infirm and she agreed. The power of attorney signed by her in 1995 stated that "this power of attorney may ***only*** be exercised during any subsequent infirmity on my part."{emphasis added} The word "only" was added to the sentence in Form 1 of the *Power of Attorney Act.* Six years later Ms. Parnall, suffering from dementia, was assessed as being unable to care for herself and her nephew arranged for her to enter a long-term care facility.

Mr. Goodrich decided it was in Ms. Parnall's best interests if her condominium was sold to pay for her care and maintenance. He found a third-party buyer and executed the transfer documents as Ms. Parnall's attorney. He filed the power of attorney with the Vancouver/New Westminster Land Title Office.

The Registrar of Land Titles, however, refused to accept the documents transferring title signed by Mr. Goodrich under the power of attorney, for two reasons:

(i) it did not conform to the requirements of section 8(1) of the *Power of Attorney Act*; and

(ii) it had expired according to section 56(3) of the *Land Title Act.*

Moreover, Mr. Goodrich did not submit to the Registrar any documents relating to Ms. Parnall's mental infirmity.

These reasons were the two issues at trial, namely:

(i) was the power of attorney granted by Ms. Parnall an enduring power of attorney according to section 8(1) of the *Power of Attorney Act;* and

(ii) if it was, had it expired because of section 56 of the *Land Title Act?*

According to section 56(1) of the *Land Title Act,* a power of attorney filed in the Land Title Office is not valid after three years after the date of its execution unless the power of attorney expressly excludes the effect of section 56. According to section 56(3), however, a power of

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attorney referred to in section 8(1) of the *Power of Attorney Act,* namely an "enduring" power of attorney that is filed in the *Land Title Act* under section 51 remains valid unless:

(i) terminated by another means; or

(ii) terminated under section 8(2) of the *Power of Attorney Act.*

The Registrar argued that these sections [section 8(1) and section 56(1)] apply only to an enduring power of attorney that is effective immediately on its execution at a time when the donor has the mental capacity to sign it. They did not apply to the power of attorney signed by Ms. Parnall because it did not take effect until she became mentally infirm when it "sprang" into operation. The Registrar also argued that the power of attorney contained no mechanism for determining her "subsequent mental infirmity."

Mr. Goodrich argued that a valid enduring power of attorney may be made conditional on the occurrence of some event, such as mental infirmity. He argued that general principles of contract law support this view and that the power of attorney in this case was valid when executed, although its authority was suspended until the occurrence of the condition precedent—Ms. Parnall's mental infirmity—which, if it did not occur, then the authority cannot be acted on. The power of attorney itself, however, was not void.

Madam Justice Wedge agreed that the issue in this case was the interpretation of a statute and was therefore a question of law—was the Registrar correct in her interpretation of section 8(1) of the *Power of Attorney Act?*

The parties agreed that the task for the court was to identify the scheme and purpose of the statute and then identify the interpretation of section 8(1) that best furthers the goals of the Act. Justice Wedge followed the "purposive approach" to statutory interpretation in which:

> the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The Supreme Court of Canada endorsed this approach in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.C. 3.

She read the words in section 8(1) of the *Power of Attorney Act* dealing with an "enduring" power of attorney and found that when the statute says the authority is to "continue" despite "subsequent" mental infirmity, the words in their plain terms mean that the authority granted by the donor before she or he becomes mentally infirm remains in force despite any mental infirmity that occurs after the authority was granted. She stated that "It follows that the authority cannot 'continue' in force following mental infirmity if the authority was not in force before the mental infirmity occurred."

She also noted that in *Chieu*, *supra*, at para. 34, it was found that the grammatical and ordinary sense of a statutory provision is not determinative; it must be read in its entire context. This apparently is achieved by examining the history of the provision:

> its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enabling the Act as a whole and in enacting the particular provision at issue.

Madam Justice Wedge discussed the legislative history of the provision. She noted that at common law, a power of attorney terminated when the donor became mentally infirm. This resulted in the power of attorney's becoming inoperative at the time it was most needed.

To resolve this unfortunate result, the BC Law Reform Commission in 1975 recommended to the Legislature that it enact a provision that would permit a donor to create a special power of attorney that would not terminate when the donor became mentally infirm. This enactment would resolve the problem of an attorney's potential liability for continuing to act without authority under a power of attorney that terminated on mental

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infirmity in circumstances where it was difficult to determine when the donor became incompetent, because the donor's mental incapacity occurred gradually and imperceptibly.

The Commission recommended the enactment of what it termed an "enduring power of attorney" that would survive the subsequent mental infirmity of the donor. [Law Reform Commission of British Columbia. Report No. 22: Report on the Law of Agency 1975 Part II – Powers of Attorney and Mental Incapacity. 1975. In response to the report, the Legislature enacted in 1979 a provision that is now section 8(1).

Justice Wedge noted that in 1990, the Commission revisited the issue of enduring powers of attorney and recommended the Act be amended to provide for a "springing power of attorney" that would become effective on the occurrence of a stipulated event such as incapacity. The Commission was of the opinion that an amendment was required to allow an enduring power of attorney to take effect at a future time, rather than immediately upon its execution. [Law Reform Commission of British Columbia. Report No. 110: Report on the Enduring Power of Attorney: Fine-Tuning the Concept. 1990.

The Commission commented that an appreciable number of persons want to have an enduring power of attorney take effect only when they become incompetent. The Commission also recommended that the proposed "springing" power of attorney include a mechanism to determine when the donor was mentally infirm. It noted that the advantage of an enduring power of attorney that took effect immediately when the donor was still competent was that it

accommodated the gradual loss of capacity.

The time of mental infirmity of the donor was not a problem because the attorney had authority from the date of execution of the power of attorney. The Commission recommended that the proposed springing power of attorney name one or more persons who would be empowered to determine when the donor became mentally infirm and thereby trigger the condition giving the attorney the authority to act.

Madam Justice Wedge emphasized that the Legislature had not enacted a provision providing for a "springing" power of attorney. She also noted that Dr. A. J. McClean, in his report to the Attorney General in 2002, "Review of Representation Agreements and Enduring Powers of Attorney," noted that the present *Power of Attorney Act* did not provide for "springing" powers of attorney; he recommended that if provision were made for such a power that it include clear mechanisms as to how the occurrence of the event be determined.

Dr. McClean referred specifically to the statute in Alberta that provides for the designation of a named person whose written declaration is conclusive evidence that the event triggering the power of attorney has happened.

The Justice also reviewed other statutes of the province to determine the meaning of the *Power of Attorney Act* because the Supreme Court of Canada in *65302 British Columbia Ltd. v. Canada*, [1999] 3. S.C.R. 804, held that "one statute may influence the meaning of the other, so as to produce harmony within the body of the law as a whole."

She noted that the *Representation Agreement Act*, RSBC 1996, c. 405, in section 15 specifically provides for a "springing" authority. Justice Wedge found that this Act stands in contrast to section 8(1) of the *Power of Attorney Act* and clearly indicates that the Legislature intended to deal with the issue because it specified a mechanism for determining the triggering event in the former Act.

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On the other hand, because the latter Act contains neither clear intention nor any triggering mechanism, it is implicit that the Legislature could not have intended for a springing power of attorney as it could have amended the *Power of Attorney Act* to permit it.

Madam Justice Wedge then referred to the provisions in the *Land Title Act* dealing with the filings for powers of attorney. She found that they do not, on their face, contemplate the filing of a "springing" power of attorney. She also found there is no mechanism in the *Land Title Act* enabling the Registrar to make a determination as to the mental capacity of a donor. Section 169 of the *Land Title Act* requires a Registrar to be satisfied that a "good, safe-holding, and marketable title" has been established by the applicant before the Registrar will register an indefeasible title to land.

Justice Wedge found that the absence of any mechanism enabling the Registrar to determine the mental capacity of a donor would require a court order directing the Registrar to accept a filing under a "springing" power of attorney. Only in this way could the Registrar be satisfied as to good and marketable title.

Moreover, the Justice found that "the purpose of the *Land Title Act* is to disclose to all third parties what interests attach to a specific piece of land": *Ratzlaff v. British Columbia (Registrar of Land Titles),* [1999] B.C.J. No. 2371 (Q.L.) at para. 19, (S.C.).

And without being able to determine whether there was a good, safe-holding, and marketable title, how could third parties conclude with certainty that a transfer registered under the Act showed an accurate state of title?

For these reasons Madame Justice Wedge concluded that Ms. Parnall's power of attorney was not an enduring power of attorney as referred to in section 8(1) of the *Power of Attorney Act* and therefore had expired pursuant to section 56(3) of the *Land Title Act*.

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Mr. Goodrich appealed on the basis that the learned trial judge erred in concluding that Ms. Parnall's power of attorney was not a power of attorney within section 8(1) of the *Power of Attorney Act*. Madam Justice Saunders gave the reasons for the Court [Madam Justices Huddart and Newbury agreeing] and interpreted the scope and purpose of the Act to determine the issue:

> whether a power of attorney, to come within section 8(1), must devolve power to an attorney prior to the donor becoming mentally infirm, or whether…it may devolve power that may only be used when the donor is mentally infirm.

Madam Justice Saunders commented that a donor who desires to devolve authority to an attorney only when she or he is mentally incompetent has an option of giving a power to take effect immediately, trusting the attorney not to use it while the donor is competent. Or, the donor may give physical possession of the document to a third person such as a solicitor, on condition that it be given to the attorney only when the donor becomes incompetent.

Both these approaches according to Justice Saunders, however, expose the donor to the risk that the power may be exercised at a time the donor does not intend it to be exercised. And, these alternatives prevent the donor's full intent from being found on the face of the document itself.

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In her reasons of judgment, Madam Justice Saunders reviewed the Reports of the BC Law Reform Commission and of Dr. McClean; she also reviewed in detail the reasons for judgment of the chambers judge. At the conclusion of her review, she stated that although the chambers judge applied the correct test for legislative interpretation, she reached a different conclusion when she applied the "purposive approach" test.

Madam Justice Saunders disagreed with the chambers judge that the word "continue" in section 8(1) of the *Power of Attorney Act* precluded the power becoming operative on mental infirmity. She took the view that "section 8 was intended to address termination of the power of attorney and does not deal with a power of attorney that springs into effectiveness upon the happening of an event."

According to Justice Saunders, "the issue under section 8(1) is not the word "continue"; rather it is that which continues—the "authority." According to her, the authority is created at the moment of execution of the power of attorney, although the condition on which the authority can be exercised may not yet exist. An analogy was made with contract law and although not perfect, it was compared with the suspension effect of the condition discussed by Dickson J. [as he then was] in *Dynamic Transport Ltd. v. O.K. Detailing Ltd.,* [1978] 2 S.C.R. 1072.

Madam Justice Saunders provided an example of a valid conditional power of attorney, namely, "this power of attorney may not be exercised so long as I am a resident of British Columbia," that she found to be conceptually the same as a power of attorney that stated, "this power

of attorney may not be exercised while I am not mentally infirm." She stated that the reservation in the power of attorney in this case is, effectively, a restriction as to its use.

The Registrar submitted an argument that the legislative history does not evince an intention to provide for springing powers of attorney. Madam Justice Saunders agreed that while the issue now being considered was not addressed in this history, she did not consider that the Legislature intended to exclude a springing power of attorney that would achieve the donor's desire that it not become effective until her mental infirmity. She found that the 1990 Law Reform Commission Report to be open to this interpretation.

Nor did she find the scheme of the *Representation Agreement Act* contrary to this view. Although this Act contains details far beyond the *Power of Attorney Act*, she agreed with Dr. McClean's conclusion that the simplicity and consequent availability of powers of attorney are the reasons why they have found such utility with the public. According to Justice Saunders, "Mere absence of detail as is found in a subsequently drafted statute is not a basis, in my view, for supporting a narrow interpretation."

The Registrar also raised the issue of how she determines whether the condition in the power of attorney is met. Madam Justice Saunders found a way. She disagreed with the chambers judge that the *Land Title Act* provides no mechanism enabling the Registrar to make this determination. She agreed that although it might not be satisfactory, the Registrar is empowered under section 382(1) of the Act to conduct an inquiry to determine whether the instrument transferring title is registrable, that is, signed by the attorney under a valid power of attorney. The Registrar's decision can be appealed to the Supreme Court of BC. She stated that if she is wrong in her interpretation of the scope of section 382, the Registrar may state a case under section 314 of the *Land Title Act* or the attorney may seek a direction pursuant to Rule 10 of the *Rules of Court*.

All three of these avenues, according to Justice Saunders, will involve an enquiry into the mental state of the donor. She suggested that in the absence of an amendment to the legislation establishing a mechanism as recommended by Dr. McClean, it would be better, to avoid the consequent delay and costs involved in an enquiry, to set out in the power of attorney itself the mechanism to be employed to determine if the condition precedent has been satisfied.

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On appeal the Registrar raised a new argument, namely, that even if a springing power of attorney might be valid under section 8(1), the power of attorney in this case was not valid because one could not determine exactly when it became into effect. The Registrar argued that it "failed for uncertainty as to the date it bestowed power on Mr. Goodrich because it contained no clear mechanism for determining when Ms. Parnall was mentally infirm." Madam Justice Saunders found this argument asked the wrong question because the right question is whether, at the time that the attorney Mr. Goodrich exercised the authority given by the power of attorney, the donor Ms. Parnall was mentally infirm.

The Registrar also argued that the forms in the *Land Registry Act* that was in effect when section 8(1) was enacted and, subsequently, in the *Land Title Act Regulation* brought into force in the new *Land Title Act*, showed that the Legislature did not intend for a springing power of attorney because the forms required the attorney, at the time of applying to register it, to declare that the document, at the time it was executed, had not been revoked by the donor or that the attorney had no notice or information of the death, disability, or bankruptcy of the donor.

The Registrar argued that an attorney could not make this declaration for a springing power of attorney. Madam Justice Saunders found that not only had the regulation been repealed, but as to the extent it could be argued that the forms reveal the Legislature's intention when section 8(1) was enacted, they could not override the intention of section 8(1) that an attorney may use a power of attorney while the donor is mentally infirm.

In her opinion the forms simply addressed the termination of a power of attorney. Nor would she consider the absence of a requirement for a declaration as to the satisfaction of the condition precedent to be determinative of the correct interpretation because other avenues existed to establish the necessary facts and she had previously pointed them out.

For these reasons the appeal was allowed. The order of the chambers judge was set aside and the matter was referred back for a rehearing to determine the issue of whether Ms. Parnall was in fact mentally infirm, as stated but not proven, before the chambers judge. Madam Justice Saunders also held that the parties could resolve the issue themselves if Mr. Goodrich satisfied the Registrar that Ms. Parnall was mentally infirm at the relevant times.

Comment

This decision has settled the issue of whether a "springing" power of attorney is an enduring power of attorney under section 8(1) of the *Power of Attorney Act*. In drafting such an instrument, however, the draftsperson should proscribe on the face of the power of attorney what evidence will satisfy the condition precedent that the power of attorney will take effect only on the donor's mental infirmity. ▲

Robert S. Reid retired June 2003 from the Faculty of Law at UBC where he was Assistant Dean of Admissions and Career Placement and an Associate Professor. He remains a member of the Notary Board of Examiners and teaches our graduating BC Notaries.