

PUBLICATION

Compensation for the Power of Attorney

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With an aging Canadian population, attorney compensation under a power of attorney document is likely to become a discussion point for a growing number of Canadians when crafting their estate plans. While the basic considerations for trustee compensation are well established in Canada, compensation considerations for an attorney are not as clear.

Most jurisdictions in Canada use a similar method to calculate compensation for the executor, that is, the person who is administering your estate after your death. Generally speaking, compensation is calculated according to some type of suggested fee guidelines set out in provincial law. After that initial calculation is complete, the amount is then compared against what courts determine as “fair” and “reasonable” compensation having regard to the size of the trust, care and responsibility involved, time required, skill and ability displayed, and success in administration. There is an important distinction between calculating compensation of an executor versus that of an attorney (a financial agent who has authority over a person’s money) in that an executor’s role ends once the estate administration is completed, while an attorney may work for years in managing an incapacitated person’s estate. As a result, calculating an attorney’s compensation proves more difficult.

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Some provinces, Ontario for example, have proactively introduced legislation to provide greater clarity when calculating attorney compensation. Other provinces, such as Alberta, provide little in the way of legislative guidance. Alberta courts have considered the issue in only a handful of cases and decisions on point are somewhat ambiguous and, arguably, arbitrary. As a result, Alberta case law is not particularly helpful in formulating a way of calculating compensation for attorneys.

Following Ontario’s approach and applying the well-established “fair” and “reasonable” analysis for trustees would allow the extensive jurisprudence on trustee compensation to guide the development of jurisprudence on attorney compensation (see *Sworik (Guardian of) v Ware*, (2005), 18 ETR (3d) 132, 2005 CanLII 50596 (ON SCJ) at para 119 [Sworik] and *Laing Estate v Laing Estate* (1998), 167 DLR (4th) 150, 41 OR (3d) 571 (Ont CA) at paras 8-9). In *Sworik* (supra), Zelinski J determined the compensation payable to an attorney under a continuing power of attorney for property by first calculating the fee guidelines for attorney compensation set

out in Ontario Regulation 26/95 to the Substitute Decisions Act, 1992, SO 1992 c. 30 and then testing those amounts against the trustee compensation factors. Following Ontario's approach would substantially alleviate the uncertainty in calculating attorney compensation.

It should be noted that the Alberta Law Reform Institute is currently working on the implementation of legislative reforms regarding trustee compensation. For further information, please see the Uniform Trustee Act, which was approved by the Uniform Law Conference of Canada in 2012.

Powers of attorney are an integral part of a client's larger estate plan. When discussing attorneyship under a power of attorney, you, as the drafter of the document, should be proactive and address the issue of compensation with your client, as the current method for calculating attorney compensation in many jurisdictions in Canada is unclear at best.

To avoid disappointment and disputes, and to ensure that your client's intentions regarding compensating are fulfilled, it may be prudent to specifically address compensation when drafting the power of attorney.

For more information on this topic, please contact our office and ask to speak with any member of the Wills & Estates Group at McLeod Law LLP.

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