

**Continuing Power of Attorney for Property for
On-Reserve Residents**

By Leslie Moore (Legal Aid Ontario Duty Counsel)
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In Ontario, an Indian residing on a reserve must take into consideration the Indian Act when attempting to make a Continuing Power of Attorney for Property. Although Powers of Attorney generally fall under provincial jurisdictions, there is an instance where it can come into conflict with federal jurisdiction. A Continuing Power of Attorney over Property is an example where these two jurisdictions can conflict. Under provincial law, a grantor can give power of attorney to a third party and should the grantor subsequently become mentally incompetent, the power of attorney will continue. However, this creates a problem for Indians living on-reserve.

Section 51 of *the Indian Act* addresses the property of “Mentally Incompetent Indians”. It gives exclusive jurisdiction and authority to the Minister of Indian Affairs to the property of a person found to be mentally incompetent if the following three factors are established:

1. The person is a registered Indian within the meaning of *the Indian Act*;
2. The person is ordinarily a resident on a reserve; and
3. The person has been found to be mentally incompetent according to provincial law.

Once the above three factors have been established, the jurisdiction and authority of the Minister of Indian Affairs over the property becomes mandatory.

The reason this happens is because section 88 of *the Indian Act* basically states that when provincial laws conflict with *the Indian Act*, *the Indian Act* will prevail. In this case, the *Substitute decisions Act*, the provincial statute that governs a Power of Attorney, conflicts with *the Indian Act*. A Power of Attorney for Property cannot give someone else the right to act on your behalf when exclusive jurisdiction and authority rests with the Minister of Indian Affairs. This applies to all on and off-reserve property.

This conflict will not affect a Power of Attorney for Personal Care and it will only affect a Power of Attorney over Property once the three factors above have been established. Once the three factors are established, any Continuing Power of Attorney for Personal Property that has been made becomes invalid and is no longer effective. This applies to court orders as well. Provincial Courts cannot appoint trustees for the property of the person above.

When making a Power of Attorney for Property, it is important to keep in mind that your place of residence is an important factor to consider if you want someone else to act on your behalf should you become incapable of doing so.

(This information is for information purposes only; this is not a legal opinion. For more information please contact a lawyer who practices in this area of law.)

